129-101

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 227.

DAVIS TILLSON AND WILLIAM C. KINGSLEY, COPARTNERS, TRADING UNDER THE STYLE OF THE HURRICANE ISLAND GRANITE COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED FEBRUARY 27, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, JULY 19, 1888.

1 *I.—Petition. Filed December* 27, 1882.

In the Court of Claims. Term 1882, 1883.

DAVIS TILLSON and WILLIAM C. KINGSLEY, Copartners Trading under the Style of The Hurricane Island Granite Company,

vs.

THE UNITED STATES.

No. 13399.

To the Honorable Court of Claims:

Your petitioners, Davis Tillson and William C. Kingsley, copartners trading under the style of The Hurricane Island Granite Company, respectfully represent as follows:

On or about the 2d day of April, 1873, said Davis Tillson and William C. Kingsley, copartners trading under the style of The Hurricane Island Granite Company, entered into a written contract with the defendant, acting by A. B. Mullett, supervising architect of the Treasury Department of the United States, a copy of which contract, marked "A," is hereto attached. On or about the 17th day of September, 1877, the petitioners entered into a written contract with the defendant, acting by James G. Hill, supervising architect of the Treasury Department of the United States, a copy of which, marked "B," is hereto attached.

The second of said contracts was a modification of the
2 first, and both provided for the sale of granite by the petitioners to the defendant for the construction of the United States custom-house building to be erected at St. Louis, in the State of Missouri, and for cutting, boxing, transporting, and delivering the same.

1. By the stipulations of the first of said contracts the petitioners became bound to deliver at their own risk, at the site of said building, the cut stone therein specified, including both the cost and value of the raw material and the cost and value of the cutting thereof; and the defendant agreed, among other things, to pay to the petitioners for assuming such risk the full cost of insurance on the value of such cutting, increased by fifteen per centum thereof; and the petitioners became under said first contract the insurers of the value of the cutting of the granite specified in the schedule marked "C," hereto attached, which cutting amounted in value to the sum of $1,465,191.61. The just and reasonable cost and value of such insurance was 1½ per centum on granite of the value of $976,794.40 shipped under deck, amounting to the sum of $14,651.92, and 4⅔ per centum on granite of the value of $488,397.21 shipped on deck, amounting to $22,767.45, and the aggregate of said insurance, with 15 per centum added, is $43,032.27. The defendant has not paid said sum of $43,032.27 nor any part thereof.

2. By the second of said contracts the petitioners became bound to deliver at the site of said building stones of the number, form, size, and quality covered by the contract, but did not become bound to deliver any particular stones, nor responsible for the cost or value

of the cutting in cases of loss. On the contrary, the defendant became an owner of such an interest in said granite before its shipment from the quarry of the petitioners as bore to the interest of the petitioners therein the same proportion which the cost and value of the cutting bore to the cost and value of the raw material;

3 and in case of loss the same fell upon the parties in the proportion of their respective interests, and the petitioners were, notwithstanding such loss, still bound to furnish the full quantity provided for in said second contract, and the defendant was bound to pay the cost of replacing all cutting so lost. On the 9th day of December, 1877, the schooner Catawamteak sailed from Hurricane Island, in the State of Maine, where the quarry of the petitioners was and is located, for the city of Baltimore, laden with a cargo of cut granite, to be used in the construction of the said building at St. Louis, in the State of Missouri.

Said granite had been furnished and cut for the defendant by the petitioners under said second contract. The petitioners owned an undivided interest in said cargo equal to the value of the uncut stone. The defendant owned an undivided interest therein equal to the value added by the cutting. The entire value of the said cargo was $54,623.84. The value of the defendant's interest therein was $51,961.59, and the value of the interest of the petitioners therein was $2,662.25. On the 4th day of January, 1878, said schooner struck on Point No Point, in the Chesapeake Bay, where, having removed a part of said cargo, she remained until January 14th, 1878, when she was taken in tow for Baltimore by wreckers employed by her master, and said cargo was saved. It was the right of the petitioners under said second contract to submit to the loss of the raw material and to leave the defendant to bear the loss of the cutting, which, but for the assistance of said wreckers, would have been total. In that case the petitioners would have been bound only to replace the raw material lost, and the defendant would have been compelled to pay the cost of cutting the same.

But the petitioners advanced the cost of saving both the raw material, which was their own property, and the cutting, which was the property of the defendant. The contributive share due from

4 the defendant for saving the interest of the defendant in said cargo amounted to the sum of $1,287.60, which sum was advanced by the petitioners on or about the 4th day of January, 1878.

The defendant received and used the property so saved. The defendant thereupon became bound by an implied contract to pay to the petitioners said sum of $1,287.60, but has never paid the same nor any part thereof.

3. On the 1st day of November, 1877, the schooner Joseph Farwell sailed from Rockland, in the State of Maine, for said city of Baltimore, laden with a cargo of cut granite to be used in the construction of said building. Said granite had also been furnished to the defendants by the petitioners under said second contract. The petitioners owned an interest in said cargo equal to the value of the uncut stone, and the defendant owned an interest therein equal to the cost of the cutting. The entire value of the cargo was $23,681.87.

The value of the interest of the defendant therein was $21,475.76, and the value of the interest of the petitioners therein was $2,206.11. On or about the 8th day of November, 1877, said schooner being near Hart Island, in Long Island Sound, collided with the steamer John H. Starin and was sunk in deep water. It thereupon became the right of the petitioners to submit to their loss of the raw material of said cargo and to leave the defendant to bear the loss of the cutting, which, but for the aid of wreckers, would have been a total loss. In that case the petitioners would have been bound only to replace the raw material lost, and the defendant would have been compelled to pay the cost of cutting the same. But on or about the 18th day of January, 1878, the raising of said cargo was completed by wreckers employed for that purpose by the master of said schooner, and said cargo was forwarded by the schooner Luella A. Snow to Baltimore. And the petitioners advanced the cost of saving as well the value of the cutting, which was the property of the defendant, as the value of the raw material, which was the property of the petitioners. The contributory share due from the defendant for saving the defendant's interest in said cargo amounted to the sum of $1,981.73, which sum was advanced by the petitioners on or about the 22d day of November, 1878.

The defendant received and used the property so saved, and the defendant became thereupon bound by an implied contract to pay to the petitioners said sum of $1,981.73, but has never paid the same nor any part thereof.

4. Under said contracts it was no part of the duty of the petitioners to provide transportation of the boxing of said granite, which was not required for the protection of the raw material, the property of the petitioners, but was used for the sole purpose of protecting the cutting, which was the property of the defendant, and yet the petitioners provided transportation from said Hurricane Island, in the State of Maine, to St. Louis, in the State of Missouri, for 480 tons of said boxing, as shown by the schedule marked "D," hereto attached. The just and reasonable value of said transportation was $10.57 per ton, amounting in the aggregate to the sum of $5,073.60. The defendant received and enjoyed the benefit of the transportation of said boxing and became bound in an implied contract to pay for the same, but has never paid the said sum of $5,073.60 nor any part thereof.

5. The defendant was bound by said second contract to receive the granite inspected and accepted by the defendant's agent and shipped by the petitioners from said Hurricane Island and transported to St. Louis, in accordance with the terms of said second contract; but on or about the 14th day of June, 1879, the defendant, by Henry G. Isaacs, the superintending architect in charge of said custom-house building at St. Louis, refused to receive about 311 tons of granite which had been inspected and accepted by the defendant's agent, and had been shipped by the petitioners and transported to St. Louis, in accordance with the terms of the contract, and the petitioners were compelled to and did incur, in the months of June and July, 1879, an expense of $322 in un-

loading, handling, and reloading said granite. The defendant, by said breach of its obligation under said contract, became liable to pay to the petitioners the said sum of $322, but has never paid the same nor any thereof.

No action on said claim has been had, as the petitioners are informed and believe, by Congress or by any of the Executive Departments, except such as is shown in the exhibit marked "E," hereto attached. The petitioners are the sole owners of said claim, and no other persons are interested therein. No assignment or transfer of said claim or of any part thereof or interest therein has been made, and the petitioners are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets. The petitioners are citizens of the United States, residing at Rockland, in the State of Maine, and have at all times borne true allegiance to the Government of the United States, and have not in any way voluntarily aided or abetted or given encouragement to rebellion against the said Government, and they believe the statement of facts in this petition to be true.

The petitioners therefore demand judgment against the United States for said five sums of $43,032.27, $1,287.60, $1,981.73, $5,073.60, and $322.00, amounting in the aggregate to the sum of $51,697.20.

WM. C. KINGSLEY,
DAVIS TILLSON.

STATE OF MAINE, }
Knox County, } *ss:*

Personally appeared before me the above-named Davis Tillson and took oath that the statements above signed by him are true.

Subscribed and sworn to before me, at Rockland, Maine, December 16, 1882.

[SEAL.] W. H. TITCOMB,
Notary Public.

7 COUNTY OF KINGS, }
State of New York, } *ss:*

Personally appeared before me the above-named William C. Kingsley and took oath that the statements above signed by him are true.

Subscribed and sworn to before me, at the city of Brooklyn, this 19th day of December, 1882.

[SEAL.] O. P. QUINTARD,
Notary Public, Kings County.

Post-office address of claimant Davis Tillson, Rockland, Maine; of claimant William C. Kingsley, Brooklyn, New York; of Paine and Ladd, claimants' attorneys, No. 412 Fifth street, Washington, D. C.

Exhibit to Petition. Filed Dec. 29, 1882. *J. R.*

United States Court of Claims.

WILLIAM C. KINGSLEY and DAVIS TILLSON
v.
THE UNITED STATES. } No. 13399.

Now come the petitioners and file the annexed Exhibits A, B, C, D, and E, which are referred to in the petition herein filed December 27, 1882, as thereto annexed, but were by mistake omitted when the sheets of the petition were fastened together.

PAINE & LADD, *Atty's.*

EXHIBIT "A."

Contract Between The United States of America and The Hurricane Island Granite Company.

This contract, made and entered into this twenty-second day of April, A. D. 1873, by and between A. B. Mullett, supervising architect of the United States Treasury Department, for and in behalf of the United States of America, of the first part, and Davis Tillson and W. C. Kingsley, of Rockland, Maine, trading under the name, style, and firm of The Hurricane Island Granite Company, of the second part, to whom was awarded the contract for certain granite required for the construction of the United States custom-house building to be erected in the city of St. Louis, Missouri, on their bid, dated October 24, 1872, and received under advertisement dated September 21, 1872, witnesseth:

8

That the parties of the second part covenant and agree to and with the party of the first part to furnish from their quarry at Hurricane Island, State of Maine, and deliver at the site of the aforesaid building as much gray granite as may be required by the plans to be adopted by the Treasury Department for said building: Provided, That should such gray granite be found unsuitable for the moulding and enriched work of the superstructure of said building above the first story the parties of the second part agree to furnish granite therefor from other quarries, subject to the approval of the party of the first part.

And the parties of the second part further agree to furnish and deliver said granite at such times and in such quantities as may from time to time be ordered by the party of the first part, and that the granite shall be of the best quality, to be obtained from their quarry aforesaid, and of uniform color, free from flaws, stains, or discoloring matter, and to the entire satisfaction of the party of the first part; the stones to be furnished according to schedules of net sizes, to be furnished by the party of the first part, one inch to be added to said schedule sizes for every worked face for quarry dimensions: Provided, That no more granite than shall be required for the construction of any story of the building shall be included in

one schedule; and the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid unto the parties of the second part, or to their heirs, executors, administrators, or assigns, in lawful money of the United States, the sum of one dollar and $\frac{45}{100}$ ($1.45) per cubic foot for every cubic foot in stones delivered and accepted under this contract whose quarried dimensions do not exceed eighty (80) cubic feet, and for stones of greater dimensions the following prices: One dollar and $\frac{50}{100}$ ($1.50) per cubic foot for all stones whose quarried dimensions exceed eighty (80) cubic feet and do not exceed one hundred (100) cubic feet; one dollar and
9 $\frac{60}{100}$ ($1.60) per cubic foot for all stones whose quarried dimensions exceed one hundred (100) cubic feet and do not exceed one hundred and thirty (130) cubic feet; one dollar and $\frac{70}{100}$ ($1.70) per cubic foot for all stones whose quarried dimensions exceed one hundred and thirty (130) cubic feet and do not exceed one hundred and fifty (150) cubic feet; one dollar and $\frac{85}{100}$ ($1.85) per cubic foot for all stones whose quarried dimensions exceed one hundred and fifty (150) cubic feet and do not exceed one hundred and seventy (170) cubic feet; one dollar and $\frac{90}{100}$ ($1.90) per cubic foot for all stones whose quarried dimensions exceed one hundred and seventy (170) cubic feet and do not exceed one hundred and eighty (180) cubic feet; one dollar and $\frac{95}{100}$ ($1.95) per cubic foot for all stones whose quarried dimensions exceed one hundred and eighty (180) cubic feet and do not exceed one hundred and ninety (190) cubic feet, and two dollars ($2.00) per cubic foot for all stones whose quarried dimensions exceed one hundred and ninety (190) cubic feet, payments to be made in the following manner, viz: Ninety (90) per cent. (nine-tenths) of the value of each schedule to be paid on its delivery and acceptance at the site of the building, and ten (10) per cent. (one-tenth) to be retained until the completion of the entire contract and the approval and the acceptance of the same by the party of the first part, which amount shall be forfeited by the parties of the second part in the event of the non-fulfillment of this contract to the entire satisfaction of the party of the first part.

And the parties of the second part hereby agree to furnish all the labor, tools, and materials necessary to cut, dress, and box at the quarry all the granite aforesaid in such manner as may be directed by the party of the first part.

And the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid to the said parties of the second part, or to their heirs, executors, administrators, or assigns, in lawful money of the United States, the full cost of the said labor, tools, and materials and insurance on the same, increased by fifteen (15) per centum thereof; and for the purpose of determining the amount thereof the party of the first part shall employ such agent or agents as he may deem
10 necessary, who shall have the supervision of such cutting, dressing, and boxing, and shall take an account of such cost and expense, and shall, for such purposes, be afforded all necessary and proper facilities by said parties of the second part.

And the parties of the second part further agree to furnish such number of men as may from time to time be deemed necessary by the party of the first part for the proper prosecution of the work, and provide such shops, sheds, and other buildings as may be necessary for the proper performance of the work and for the accommodation of the workmen without cost to the Government or compensation for their use or for the rent of the land on which they may be erected.

And the said parties of the second part further agree to cut, as well as furnish and deliver, all granite herein contracted for at such times as may be required by the said party of the first part, and in default thereof to forfeit and pay to the United States the sum of one hundred dollars ($100.00) per diem for each and every day thereafter until the final completion of the same, which sum shall be deducted from any moneys which may be due them, and if that amount be not due them, then their bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States.

And the said parties of the second part further covenant and agree to and with the party of the first part to lease, and hereby do let and lease, their quarry or quarries at Hurricane Island, Maine, with all and singular the tools, buildings, wharves, and appurtenances thereto pertaining, unto the said party of the first part, with the full right, authority, and power to enter upon, occupy, and use the same or procure therefrom any or all such stones as the parties of the second part shall fail, omit, or decline to furnish, and said lease shall continue in full force until the final completion of the delivery of the granite herein contracted for, it being understood and agreed that the object of this lease is to secure to the party of the first part a sufficient and suitable supply of granite for said building from the quarry or quarries aforesaid, and that such entry or occupancy of the said premises shall not be made by the party of the first part unless the parties of the second part shall be in default and unless the party of the first part shall give to the parties
11 of the second part eight (8) days' notice of intention so to do, said notice to be in writing, served personally upon the said parties of the second part or left at the shop, office, or usual place of abode of the said parties of the second part or with their agent or agents.

And in case of said default or failure to comply with the conditions of this contract at the end of said eight (8) days the party of the first part shall enter into full and complete possession of the said quarry or quarries, with their appurtenances, as aforesaid, and shall work them at the expense of the said party of the second part, and the full expense of said working and procuring the stone and of boxing, shipping, and delivering the same at the site of the building aforesaid shall, after deducting the value of the granite, as hereinbefore agreed, be increased by fifteen (15) per centum, which amount shall be deducted from any money or moneys that may be due said parties of the second part, and if that amount be not due them, then their sureties are to be held liable for any deficiency, to

be recovered from them by suit in the name of the United States; and in the event of any such entry, occupancy, or use under this contract or lease the quarry or quarries shall be worked by the party of the first part or under his direction in such workmanlike manner as not unnecessarily to injure the same, and the appurtenances shall be kept in good repair, usual wear and tear excepted, and the premises and appurtenances shall be duly released and restored to the parties of the second part or their legal representatives, without unnecessary delay, whenever the purposes of this lease, as herein declared, shall have been accomplished.

It is further covenanted and agreed between the parties to this contract that the parties of the second part shall execute, with two or more good and sufficient sureties, a bond to the United States in the sum of fifty thousand dollars ($50,000), conditioned for the faithful performance of this contract and the agreements and covenants herein made by the said parties of the second part.

It is also covenanted and understood that no member of Congress or other person whose name is not at this time disclosed shall be admitted to any interest in this contract, and it is further covenanted and agreed that this contract shall not be assigned,
12 except by consent of the Secretary of the Treasury, and that any assignment thereof, except as aforesaid, will be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto that this contract shall be valid and binding when approved by the Secretary of the Treasury and not otherwise, and that no departure from its conditions shall be made without his written consent.

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above written.

(Signed) A. B. MULLETT, [SEAL.]
Supervising Architect.
" DAVIS TILLSON, [SEAL.]
" W. C. KINGSLEY, [SEAL.]
Contractors.

Witnesses to signature of supervising architect:
(Signed) A. G. MILLS.
" L. E. GANNON.

Witnesses to signature of the contractors:
(Signed) R. H. BURNHAM.
" M. J. ACHOM.
" HENRY BEAM, to W. C. K.
" J. A. KINGSLEY.

Know all men by these presents that we, Davis Tillson, of Rockland, Knox Co., Maine, and Wm. C. Kingsley, of Brooklyn, county of Kings, and State of New York, principals, and Joseph Farwell and John T. Berry, both of Rockland, county of Knox, and State of

Maine, sureties, are held and firmly bound unto the United States of America in the sum of fifty thousand dollars ($50,000), to be paid as liquidated damages; for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, or assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 22d day of April, A. D. 1873.

The condition of the above obligation is such that whereas the said Davis Tillson and Wm. C. Kingsley have entered into a certain contract, hereto attached, with A. B. Mullett, supervising architect U. S. Treasury Department, acting for and in behalf of the
13 United States, bearing date the 22nd day of April, 1873:

Now, if the said Davis Tillson and Wm. C. Kingsley shall well and truly comply with all the conditions of said contract and shall perform all the undertakings therein stipulated by them to be performed, then this obligation to be void; otherwise to remain in full force and virtue.

In testimony whereof the said Davis Tillson, Wm. C. Kingsley, Joseph Farwell, and John T. Berry have hereunto subscribed their hands and affixed their seals the day first above written.

(Signed) DAVIS TILLSON. [SEAL.]
" WM. C. KINGSLEY. [SEAL.]
" JOSEPH FARWELL. [SEAL.]
" JOHN T. BERRY. [SEAL.]

Signed, sealed, and delivered in presence of—

(Signed) EDWIN ROSE,
To J. F. & D. T.
" GEORGE W. WHITE,
To D. T., J. F., & J. T. B.
" CLARA O. SPAULDING,
To J. T. B.
" HENRY BEAM,
To W. C. K.
" J. A. KINGSLEY,
To W. C. K.

STATE OF MAINE, } ss:
County of Knox, }

Personally appeared before me, a justice of the peace and register of deeds in and for said county of Knox, the said Joseph Farwell and said John T. Berry, who signed the above obligation, and who made

solemn oath that they are each worth fifty thousand dollars over and above their legal liabilities.

(Signed) JOSEPH FARWELL.
(Signed) JOHN T. BERRY.

(Signed) EDWIN ROSE,
To J. F.
" GEO. W. WHITE,
To J. F. and J. T. B.
" CLARA O. SPAULDING,
To J. T. B.

Sworn to and subscribed, as above written, before me this 22d day of April, 1873.

(Signed) GEORGE M. WHITE,
Justice of the Peace and Register of Deeds.

14 OFFICE OF THE U. S. COLLECTOR OF CUSTOMS,
DISTRICT OF WALDOBORO',
PORT OF ROCKLAND, *April 22d, A. D.* 1873.

I hereby certify that Joseph Farwell and John T. Berry, the sureties who have signed the foregoing bond, are known to me as residents of Rockland, Maine, and citizens of the United States, and that I believe them to be amply sufficient security for the amount thereof, and that the bond is good.

(Signed) J. W. CROCKER,
Dep. Collector.

EXHIBIT " B."

It is hereby understood and agreed by and between the parties to the annexed contract of April 22d, A. D. 1873, to wit:

The United States of America, now acting by James G. Hill, supervising architect of the United States Treasury Department, of the first part, and Davis Tillson and W. C. Kingsley, both of the city of Rockland and State of Maine, trading under the name, style, and firm of the Hurricane Island Granite Company, of the second part, that the said contract of April 22d, 1873, by mutual consent of the said parties, be, and the same is hereby, modified so as to read as follows, to wit:

Contract Between the United States of America and The Hurricane Island Granite Company.

This contract, made and entered into this twenty-second day of April, A. D. 1873, by and between Alfred B. Mullett, supervising architect of the United States Treasury Department, for and in behalf of the United States of America, of the first part, and David Tillson and W. C. Kingsley, both of the city of Rockland and State of Maine, trading under the name, style, and firm of the Hurricane Island Granite Company, of the second part, to whom was awarded

the contract for certain granite required for the construction of the United States custom-house building to be erected in the city of St. Louis, Missouri, on their bid dated October 24th, 1872, and received under advertisement dated September 21st, 1872, witnesseth:

That the parties of the second part covenant and agree to and with the party of the first part to furnish from their quarry
15 at Hurricane Island, State of Maine, and deliver at the site of the aforesaid building such pieces of granite as may be required for the exterior walls of the superstructure of the building aforesaid and as may be designated by the party of the first part, and to cut, dress, and box the same, subject to the limitation hereinafter named—that is to say, the entire cost of said granite and the cutting and boxing thereon at the rates and upon the terms hereinafter specified to the United States to be one hundred and seventy-five thousand dollars ($175,000); and the parties of the second part further agree that the granite shall be of the best quality to be obtained from the quarry aforesaid, and of uniform color, free from flaws, stains, and discoloring matter, and to the entire satisfaction of the party of the first part.

And the parties of the second part, whenever the said party of the first part shall so order, there being no appropriation therefor, further agree to furnish and deliver from the same quarry, and do all the cutting and boxing required thereon, and at such time or times as may be ordered, and on the same terms and conditions, and at the same rates, and of the same kind and quality, all the granite which may be required for the exterior walls of the superstructure of said building when the construction of any additional part thereof shall be authorized; and the party of the first part, acting for and in behalf of the United States, doth covenant and agree to pay or cause to be paid by the United States, unto the said parties of the second part or to their heirs, executors, administrators, and assigns, in lawful money of the United States, the sum of one dollar and $\frac{45}{100}$ ($1.45) per cubic foot for every cubic foot of stones delivered and accepted under this contract whose quarried dimensions do not exceed eighty (80) cubic feet, and for stones of greater dimensions the following prices: One dollar and $\frac{50}{100}$ ($1.50) per cubic foot for all stones whose quarried dimensions exceed eighty (80) cubic feet and do not exceed one hundred (100) cubic feet; one dollar and $\frac{60}{100}$ ($1.60) per cubic foot for all stones whose quarried dimensions exceed one hundred (100) cubic feet and do not exceed one hundred and thirty (130) cubic feet; one dollar and $\frac{70}{100}$ ($1.70) per cubic foot for all stones whose quarried dimensions exceed one hundred and thirty (130) cubic feet and do not exceed one hundred and fifty
16 (150) cubic feet; one dollar and $\frac{85}{100}$ ($1.85) per cubic foot for all stones whose quarried dimensions exceed one hundred and fifty (150) cubic feet and do not exceed one hundred and seventy (170) cubic feet; one dollar and $\frac{90}{100}$ ($1.90) per cubic foot for all stones whose quarried dimensions exceed one hundred and seventy (170) cubic feet and do not exceed one hundred and eighty (180) cubic feet; one dollar and $\frac{95}{100}$ ($1.95) per cubic foot for all stones whose quarried dimensions exceed one hundred and eighty

(180) cubic feet and do not exceed one hundred and ninety (190) cubic feet, and two dollars ($2.00) per cubic foot for all stones whose quarried dimensions exceed one hundred and ninety (190) cubic feet, the stones to be furnished according to schedules of net sizes, to be furnished by the party of the first part, one (1) inch to be added to said schedule sizes for every worked face for quarried dimensions; and the parties of the second part further agree to cut (including Lewis holes), dress, and box, before transportation to the site of the building, all the granite as aforesaid in such manner as may be directed by the party of the first part and to his entire satisfaction, it being understood that the stone-cutting work upon the stone of the third story to be cut and dressed shall be of the quality known as the best quality, eight (8) cut work, and equal in quality and grade to the cutting upon a sample stone to be furnished by the party of the first part; and, further, that the said work, together with all mouldings, enrichments, and carvings, shall be in accordance with the plans of said building and shall be executed, together with the boxing thereon, as required by the party of the first part and to his entire and complete satisfaction.

And it is further agreed that the party of the first part or his authorized agent at such quarry shall inspect all stones after they are cut and dressed and before they are shipped, and shall determine whether they come up to the standard cutting, both in dimensions and quality of cutting, and shall determine whether the stone is of the proper texture, color, and grain, and is properly boxed, and his decision shall be final, and for this purpose the party of the first part or his authorized agent shall be afforded all necessary and proper facilities; and it is further understood and agreed that the party of the first part assumes all
17 risk of damage to cutting on said stone while being transported to the site of said building, provided such damage does not result from the carelessness or negligence of the said parties of the second part, and the party of the first part, acting for and in behalf of the United States, doth covenant and agree to pay or cause to be paid unto the said parties of the second part, in lawful money of the United States, the following sums for the cutting, dressing, and boxing of the said granite, to wit:

3rd story, course	A,	base	$6	75	per cubic foot.
"	"	balusters	11	54	"
"	B,	die	7	00	"
"	"	balusters	54	40	"
"	C,	cap	11	50	"
"	"	capping	17	65	"
"	D,	ashlar	2	50	"
"	"	pilaster bases	16	00	"
"	"	col. bases	18	00	"
"	"	pilaster shafts	4	80	"
"	"	col. shafts	5	27	"
"	"	col. caps	86	07	"

3rd story, course D,		cor. pilaster caps	83	54	per cubic foot.
"	"	pilaster caps	81	65	"
"	"	internal angle caps	55	81	"
"	"	window jambs	7	50	"
"	"	" consoles	14	24	"
"	"	" caps	7	75	"
"	"	E, " architraves	6	50	"
"	"	F, ashlar	2	50	"
"	"	brackets, ordinary	10	76	"
"	"	" corner	10	88	"
"	"	G, dentil	17	10	"
"	"	H, cornice	6	86	"

All of the above prices per cubic foot to be paid upon quarry dimensions; and it is further understood between the parties aforesaid that if the market rate of wages of stone-cutters, as ascertained by the Secretary of the Treasury, shall at any time during the execution of this contract exceed three dollars and fifty cents ($3.50) per diem, then for each increase of twelve and one-half (12½) cents per diem in the wages beyond three dollars and fifty cents ($3.50) per diem the prices for cutting as above agreed
18 upon shall be increased by three (3) per centum: Provided, however, That the United States may, at its option, pay the above increase or suspend the cutting of the stone under this contract until the prices of stone-cutters' wages shall have fallen to three dollars and fifty cents ($3.50) per diem; and it is furthermore understood and agreed that payments for the granite furnished and cut, dressed, boxed, and delivered in perfect good order and, as aforesaid, upon the site of the said building, at St. Louis, Missouri, shall be made by the party of the first part in the following manner, to wit: Ninety per centum (nine-tenths) of the cost as above as rapidly as the stones are delivered as aforesaid at the site of the building: Provided, however, That eighty per centum of the cost of the cutting upon such blocks of stone as shall have been cut, dressed, boxed, and ready for shipment to the site of the building and are still at the stone-cutting yards at Hurricane Island upon the last day of each calendar month will be paid by the party of the first part, said payments to be deducted from the payments that will become due when the stones are delivered upon the site of the building.

And it is further agreed that ten per centum (one-tenth) of the cost as aforesaid is to be retained until the completion of the entire order or schedule and the completion of the contract and the approval and acceptance of the same by the party of the first part, which amount of ten per centum shall be forfeited by the parties of the second part in the event of the non-fulfillment of this contract to the entire satisfaction of the party of the first part; and the said parties of the second part further covenant and agree to and with the party of the first part to lease, and hereby does let and lease, the quarry or quarries at Hurricane Island, Maine, with all and singular the tools, buildings, wharves, and appurtenances thereunto appertaining, unto the said party of the first part, with the full

right, authority, and power to enter upon, occupy, and use the same or procure therefrom any or all such stones as the parties of the second part shall fail, omit, or decline to furnish, and that such entry or occupancy of the said premises shall not be made by the party of the first part unless the parties of the second part shall be in default and unless the party of the first part shall give to the parties of the second part eight (8) days' notice of intention to do so, said notice to be
19 in writing and served personally upon or left at the shop, office, or usual place of abode of the said parties of the second part or with his agent or agents; and in case of said default or failure to comply with the conditions of this contract at the end of eight (8) days the party of the first part shall enter into full and complete possession of the said quarry or quarries, with their appurtenances as aforesaid, and shall work them at the expense of the said parties of the second part, and the full expense of said working and procuring the stone and of boxing, shipping, and delivering the same at the site of the building as aforesaid shall, after deducting the value of the granite as hereinbefore agreed, be increased by fifteen (15) per centum, which amount shall be deducted from any money or moneys that may be due said parties of the second part, and if that amount be not due them, then their sureties are to be held liable for any deficiency, to be recovered from them by suit in the name of the United States. In the event of any such entry, occupancy, or use under this contract and lease the quarry or quarries shall be worked by the party of the first part, or under his direction, in such workmanlike manner as not unnecessarily to injure the same, and the appurtenances shall be kept in good repair, usual wear and tear excepted, and the premises and appurtenances shall be duly released and restored to the parties of the second part or their legal representatives without unnecessary delay whenever the purpose of this lease as herein declared shall have been accomplished.

It is further covenanted and agreed between the parties to this contract that the parties of the second part shall execute, with two or more good and sufficient securities, a bond to the United States in the sum of fifty thousand dollars ($50,000), conditioned for the faithful performance of this contract and the agreements and covenants herein made by the parties of the second part.

It is also covenanted and understood that no member of Congress or other person whose name is not at this time disclosed shall be admitted to any share in this contract; and it is further covenanted and agreed that this contract shall not be assigned and that any assignment thereof shall be a forfeiture of the same.

It is further covenanted and agreed by and between the parties hereto that this contract shall be valid and binding when
20 approved by the Secretary of the Treasury and not otherwise, and that no departure from its conditions shall be made without his written consent.

In witness whereof the parties hereto have hereunto subscribed

their names and affixed their seals the day and year first above written.

(Signed) A. B. MULLETT, [SEAL.]
Supervising Architect.
(Signed) DAVIS TILLSON. [SEAL.]
(Signed) WM. C. KINGSLEY. [SEAL.]

Witnesses to signature of supervising architect:
(Signed) A. G. MILLS.
(Signed) L. E. GANNON.

Witnesses to signatures of the contractors:
(Signed) R. H. BURKHAM.
(Signed) M. J. ACHOM.
(Signed) HENRY BEAM,
To Wm. C. Kingsley.
(Signed) J. A. KINGSLEY.

In witness whereof we, the undersigned, James G. Hill, acting for and in behalf of the United States, of the first part, and Davis Tillson and Wm. C. Kingsley, of the second part, have hereunto subscribed our names and affixed our seals this seventeenth day of September, A. D. 1877.

(Signed) JAS. G. HILL, [SEAL.]
Supervising Architect.
(Signed) DAVIS TILLSON. [SEAL.]
(Signed) WM. C. KINGSLEY. [SEAL.]

Witnesses to signature of supervising architect:
(Signed) RUFUS H. THAYER.
(Signed) W. J. P. CLARKE.

Witnesses to signatures of the contractors:
(Signed) W. S. WHITE.
(Signed) T. E. SIMONTON.
(Signed) HENRY BEAM.
(Signed) FRANK B. TRACY.

Bond.

Know all men by these presents that we, Davis Tillson, of Rockland, Knox county, Maine, and W. C. Kingsley, of Brooklyn, county of Kings, and State of New York, principals, and Maynard
21 Sumner and John S. Case, of Rockland, county of Knox, and State of Maine, sureties, are held and firmly bound unto the United States of America in the sum of fifty thousand dollars ($50,000), to be paid as liquidated damages; for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, or assigns, jointly and severally, firmly by these presents.

Sealed with our hands and dated this seventeenth day of September, A. D. 1877.

The condition of the above obligation is such that whereas the

said Davis Tillson and W. C. Kingsley have entered into a certain contract, hereto attached, with James G. Hill, supervising architect U. S. Treasury Department, acting for and in behalf of the United States, bearing date the 17th day of September, 1877:

Now, if the said Davis Tillson and W. C. Kingsley shall well and truly comply with all the conditions of said contract and shall perform all the undertakings therein stipulated by them to be performed, then this obligation to be void; otherwise to remain in full force and virtue.

In testimony whereof the said Davis Tillson and W. C. Kingsley and Maynard Sumner and John S. Case have hereunto subscribed their hands and affixed their seals the day first above written.

(Signed) DAVIS TILLSON. [SEAL.]
(Signed) WM. C. KINGSLEY. [SEAL.]
(Signed) MAYNARD SUMNER. [SEAL.]
(Signed) JOHN S. CASE. [SEAL.]

Signed, sealed, and delivered in the presence of—

(Signed) W. S. WHITE,
To D. T.
(Signed) T. E. SIMONTON,
To D. T.
(Signed) HENRY BEAM,
To W. C. K.
(Signed) FRANK B. TRACY,
To W. C. K.
(Signed) W. H. TITCOMB,
To M. S.
(Signed) W. S. WHITE,
To M. S.
(Signed) G. W. KIMBALL, JR.,
To J. S. C.
(Signed) W. H. TITCOMB,
To. J. S. C.

STATE OF MAINE, } ss:
County of Knox, }

Personally appeared before me, a notary public in and for
22 said county, the said Maynard Sumner and said John S. Case, who signed the above obligation, and who made solemn oath that they are each worth fifty thousand dollars over and above their legal liabilities.

(Signed) MAYNARD SUMNER.
(Signed) JOHN S. CASE.

(Signed) W. H. TITCOMB.
(Signed) W. S. WHITE,
To M. S.
(Signed) W. H. TITCOMB,
To J. S. C.
(Signed) G. W. KIMBALL,
To J. S. C.

Sworn to and subscribed, as above written, before me this 17th day of Sept., 1877.

(Signed) W. H. TITCOMB, [SEAL].
Notary Public.

OFFICE OF THE U. S. COLLECTOR'S OFFICE,
DISTRICT OF WALDOBORO',
PORT OF ROCKLAND, *Sept. 17th, A. D.* 1877.

I hereby certify that Maynard Sumner and John S. Case, the sureties who have signed the foregoing bond, are known to me as residents of Rockland and citizens of the United States, and that I believe them to be amply sufficient security for the amount thereof, and that the bond is good.

(Signed) J. W. CROCKER,
D'p't. Collector.

It is hereby understood and agreed by and between the parties to the annexed contract, bearing date September 17, 1877, that the clause therein relating to the prices to be paid for cutting, dressing, lewising, and boxing granite for the third story of the United States custom-house, court-house, and post-office building at St. Louis, Missouri, is amended by adding thereto the following prices for cutting, dressing, lewising, and boxing the granite required for the fourth or attic story of the aforesaid building, viz:

Course a, base, per cubic foot	$3 75
" " baluster base, per cubic foot	5 24
" b, die base, " "	4 80
" " balusters, each	40 00
" " baluster cappings, per cubic foot	11 39
" " pilaster bases, " "	9 72
" " column " " "	12 00
Course b, brackets " "	7 29
23 " " window jambs, per cubic foot	6 37
" " ashlar, "	2 50
Course b, pilaster shafts, per cubic foot	4 80
" " column " "	5 25
" b b, dentil, "	14 79
" c, impost, "	8 00
" " carvings on caps, each	20 00
" d, spandrels, per cubic foot	5 00
" " keystones, each	55 00
" " blocking course, per cubic foot	2 50
" e, architrave, "	5 50
" f, bed-mould, "	9 00
" " saffit stones, "	2 50
" c & g, cornice (including all cornices), per cubic foot	7 75
" h, pedestal base, per cubic foot	4 00
" i, die, "	2 50
" k, capping, "	5 50

In witness whereof we, the undersigned, Jas. G. Hill, supervising architect, acting for and in behalf of the United States of America, of the first part, and Davis Tillson and Wm. C. Kingsley, of the second part, have hereunto subscribed our names and affixed our seals this first day of November, A. D. 1878.

(Signed) JAS. G. HILL, [SEAL.]
Supervising Architect.
(Signed) DAVIS TILLSON. [SEAL.]
(Signed) WM. C. KINGSLEY. [SEAL.]

Witnesses to signature of supervising architect:
(Signed) HORACE G. JACOBS.
(Signed) E. G. CHURCH.

Witnesses to signature of Davis Tillson:
(Signed) W. S. WHITE.
(Signed) L. C. BANKS.

Witnesses to signature of Wm. C. Kingsley:
(Signed) JOHN P. HUDSON.
(Signed) HENRY BEAM.

The undersigned, Maynard Sumner and John S. Case, sureties for the faithful performance of the contract dated September
24 seventeenth, 1877, above referred to, hereby consent to the foregoing amendment as the same is set forth, and declare that our obligations as such sureties shall be held to be unimpaired thereby.

Witness our hands and seals this seventh day of November, A. D. 1878.

(Signed) MAYNARD SUMNER. [SEAL.]
(Signed) JOHN S. CASE. [SEAL.]

In the presence of—
(Signed) O. A. KALLOCH.
(Signed) G. HOWE WIGGIN.
(Signed) H. P. HARDEN,
To J. S. C.
(Signed) C. S. ROBERTS,
To J. S. C.

EXHIBIT C.

United States to Hurricane Granite Co., Dr., dealers in rough, cut, and polished granite, Davis Tillson, proprietor.

P. O. address, Rockland, Me.

To premiums for insurance on value of the cutting on granite for the new C. H. and P. O. at St. Louis, Mo., and 15 per centum thereon, in accordance with terms of contract, dated April 22d, 1873, between Hurricane Granite Co. and United States:	
Premium on $976,794.40, shipped under deck; rate, 1½ per cent.	$14,651 92
Premium on $488,397.21, shipped on deck; rate, 4⅔ per cent.	22,767 45
15 per cent. on premiums	5,612 90
	$43,032 27

EXHIBIT D.

United States to Hurricane Granite Co., Dr., dealers in rough, cut, and polished granite, Davis Tillson, proprietor.

P. O. address, Rockland, Me.

To freight on 480 tons lumber and hoop iron used on granite for the U. S. C. H. & P. O. at St. Louis, and transported there by Hurricane Granite Co. from their quarries, at Hurricane Island, Me., to site of building, at cost of $10.57 per ton	$5,073 60

EXHIBIT E.

Extract from Statement of James G. Hill, Supervising Architect U. S. Treasury Dep't, Dated April 10, 1882.

"The contractor declined to take any steps toward the recovery of the cargo (his interest confined to stock being less than the wrecking company's charges for recovery) except on condition that the Government would pay its proportionate share of such charges. An agreement was entered into by me to pay such portion of the expenses, and nearly the entire cargo was saved at a cost to the Government of $3,646."

Extract from Opinion of B. Wilson, Solicitor of the Treasury, Dated Feb. 26, 1876.

"The insurance covering only the value of the labor and boxing, which at this stage, if I understand the contract, belongs to the United States, is not necessarily, according to the terms of the contract, to be effected by the contractors at the additional expense of

fifteen per centum, as in the case of the cost at the quarry. It is for the officers of the Government to take all proper measures for the security of the labor, &c., which has been put upon the stone and paid for.

"This answer to the first question implies also the answer to be given to the second, which is that in case of the loss of a cut stone on the shipment to St. Louis, the place of delivery of the granite in the rough, or of its damage on such shipment, the United States must suffer the loss of cutting, the contractors suffering, at the same time, the loss of the stone or its value in the rough state. In case of such loss the contractors are still bound to deliver the rough stone at St. Louis.

"The peculiar provisions of the contract present that anomalous condition arising from a divided ownership, as between the contractors and the United States in the granite while in transit to its destination.

26 "I have endeavored to construe the provision in question so as to carry out what seems to have been the true intent thereof, applying the rule of law that when the terms of a mutual contract are not definitely expressed such a construction should be given as will secure to each party equal and exact justice."

The questions submitted to Mr. Wilson were (1) whether the United States was bound by the contract of 1873 to pay to the contractors the actual cost of insurance upon the labor as represented by the cutting on the stone with 15 per cent. added, and (2) whether the United States must lose the cost of cutting in case of loss in transit.

Extract from the Opinion of Kenneth Rayner, Solicitor of the Treasury, Dated March 26, 1878.

"The expenses so paid were incident to the transportation of the stone; and if the contractors paid the same as necessary to enable them to complete their contract by a delivery of the stone they did no more than it was proper and right for them to do, but in their own interests, and not in the interests of the Government. The interests of the latter were secured by the bond annexed to the contract. The expenses were necessarily and properly to be borne by the contractors. They constituted part of the risk the parties assumed in undertaking to make the delivery, and it was a reasonable assumption that in a business point of view the expenses were calculated for in the terms of their contract."

Mr. Rayner, in his opinion of May 15, 1880, referring to Mr. Wilson's opinions of Feb. 26, 1876, says:

"That opinion goes no further than this, that in case a stone, with the cutting and labor thereon, is destroyed or lost without the negligence or fault of the contractors the loss of the cutting and labor already paid for falls upon the United States. It does not undertake to assert, nor is it liable to necessary implication therefrom, that the Government must share in the expense of raising the wrecked stone, which actually belongs to the contractor. This expense is a necessary incident to the undertaking of the contractor to deliver

the stone at St. Louis. He is bound, under his bond and contract, to so deliver it and to use all proper means and to incur any expense to that end, or, failing to do so, is liable in damages."

Hon. Charles J. Folger, Secretary of the Treasury, disapproved the claim of the petitioners for reimbursement of the amount paid for saving the defendant's interest in the granite on board the schooners Catawamteak and Farwell. The petitioners' copy of his written decision has been mislaid, but the original is on file in the office of the supervising architect of the United States Treasury Department.

27 *II.—Traverse. Filed January* 16, 1883.

And now comes the Attorney General, on behalf of the United States, and, answering the petition of the claimant herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

And as to so much of the said petition as avers that the said claimant has at all times borne true faith and allegiance to the Government of the United States, and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the Attorney General, in pursuance of the statute in such case provided, denies the said allegations, and asks judgment accordingly.

THOMAS SIMONS,
Ass't Attorney General.

28 *III.—Findings of Fact and Conclusion of Law. Filed April* 6, 1885.

This case having been heard before the Court of Claims, the Court, upon the evidence, finds the facts as follows:

I.

The claimants and defendants entered into the following contracts:

This contract, made and entered into this twenty-second day of April, A. D. 1873, by and between A. B. Mullett, supervising architect of the United States Treasury Department, for and in behalf of the United States of America, of the first part, and Davis Tillson and W. C. Kinsley, of Rockland, Maine, trading under the name, style, and firm of the Hurricane Island Granite Company, of the second part, to whom was awarded the contract for certain granite required for the construction of the United States custom-house building to be erected in the city of St. Louis, Missouri, on their bid dated October 24, 1872, and received under advertisement dated September 21, 1872, witnesseth:

That the parties of the second part covenant and agree to and with the party of the first part to furnish from their quarry, at Hurricane Island, State of Maine, and deliver at the site of the aforesaid

building as much gray granite as may be required by the plans to be adopted by the Treasury Department for said building.

* * * * * * *

And the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid unto the said parties of the second part, or to their heirs, executors, administrators, or assigns, in lawful money of the United States, the sum of one dollar and $\frac{45}{100}$ ($1.45) per cubic foot for every cubic foot in stones delivered and accepted under this contract whose quarried dimensions do not exceed eighty (80) cubic feet, and for stones of greater dimensions the following prices:

One dollar and $\frac{50}{100}$ ($1.50) per cubic foot for all stones whose quarried dimensions exceed eighty (80) cubic feet and do not exceed one hundred (100) cubic feet; one dollar and $\frac{60}{100}$ ($1.60) per cubic foot for all stones whose quarried dimensions exceed one hundred (100) cubic feet and do not exceed one hundred and thirty (130) cubic feet; one dollar and $\frac{70}{100}$ ($1.70) per cubic foot for all stones whose quarried dimensions exceed one hundred and thirty (130) cubic feet and do not exceed one hundred and fifty (150) cubic feet; one dollar and $\frac{85}{100}$ ($1.85) per cubic foot for all stones whose quarried dimensions exceed one hundred and fifty (150) cubic feet and do not exceed one hundred and seventy (170) cubic feet; one dollar and $\frac{90}{100}$ ($1.90) per cubic foot for all stones whose quarried dimensions exceed one hundred and seventy (170) cubic feet and do not exceed one hundred and eighty (180) cubic feet; one dollar and $\frac{95}{100}$ ($1.95) per cubic foot for all stones whose quarried dimensions exceed one hundred and eighty (180) cubic feet and do not exceed one hundred and ninety (190) cubic feet, and two dollars ($2.00) per cubic foot for all stones whose quarried dimensions exceed one hundred and ninety (190) cubic feet, payments to be made in the following manner, viz: Ninety (90) per cent. (nine-tenths) of the value of each schedule to be paid on its delivery and acceptance at the site of the building, and ten (10) per cent. (one-tenth) to be retained until the completion of the entire contract and the approval and acceptance of the same by the party of the first part, which amount shall be forfeited by the parties of the second part in the event of the non-fulfillment of this contract to the entire satisfaction of the party of the first part.

And the parties of the second part hereby agree to furnish all the labor, tools, and material necessary to cut, dress, and box at the quarry all the granite aforesaid in such manner as may be directed by the party of the first part.

And the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid unto the said parties of the second part, or to their heirs, executors, administrators, or assigns, in lawful money of the United States, the full cost of the said labor, tools, and material and
29 insurance on the same, increased by fifteen (15) per centum thereof; and, for the purpose of determining the amount thereof, the party of the first part shall employ such agent or agents as he may deem necessary, who shall have the supervision of such

cutting, dressing, and boxing, and shall take an account of such cost and expense, and shall, for such purposes, be afforded all necessary and proper facilities by said parties of the second part.

And the parties of the second part further agree to furnish such number of men as may from time to time be deemed necessary by the party of the first part for the proper prosecution of the work, and provide such shops, sheds, other buildings as may be necessary for the proper performance of the work and for the accommodation of the workman without cost to the Government or compensation for their use or for the rent of the land on which they may be erected.

* * * * * * *

In witness whereof the parties hereto have hereunto subscribed their names and affixed their seals the day and year first above mentioned.

A. B. MULLETT, [SEAL.]
Supervising Architect.
DAVIS TILLSON, [SEAL.]
WM. C. KINGSLEY, [SEAL.]
Contractors.

It is hereby understood and agreed by and between the parties to the annexed contract of April 22nd, A. D. 1873, to wit: The United States of America, now acting by James G. Hill, supervising architect of the United States Treasury Department, of the first part, and Davis Tillson and W. C. Kingsley, both of the city of Rockland and State of Maine, trading under the name, style, and firm of Hurricane Island Granite Company, of the second part, that the said contract of April 22nd, 1873, by mutual consent of the said parties, be, and the same is hereby, modified so as to read as follows, to wit:

Contract Between United States of America and the Hurricane Island Granite Company.

This contract, made and entered into this twenty-second day of April, A. D. 1873, by and between Alfred B. Mullett, supervising architect of the United States Treasury Department, for and in behalf of the United States of America, of the first part, and Davis Tillson and W. C. Kingsley, both of the city of Rockland and State of Maine, trading under the name, style, and firm of the Hurricane Island Granite Company, of the second part, to whom was awarded the contract for certain granite required for the construction of the United States custom-house building to be erected in the city of St. Louis, Missouri, on their bid dated October 24th, 1872, and received under advertisement dated September 21st, 1872, witnesseth: That the parties of the second part covenant and agree to and with the party of the first part to furnish from their quarry at Hurricane Island, State of Maine, and deliver at the site of the aforesaid building such pieces of granite as may be required for the exterior walls of the superstructure of the building aforesaid and as may be designated by the party of the first part, and to cut, dress, and box the same, subject to the limitation hereinafter named—that is to say,

the entire cost of said granite and the cutting and boxing thereon at the rates and upon the terms hereinafter specified to the United States to be one hundred and seventy-five thousand dollars ($175,000).

And the parties of the second part further agree that the granite shall be of the best quality to be obtained from the quarry aforesaid, and of uniform color, free from flaws, stains, and discoloring matter, and to the entire satisfaction of the party of the first part; and the parties of the second part, whenever the said party of the first part shall so order, there being appropriations therefor, further agree to furnish and deliver from the same quarry, and do all the cutting and boxing required thereon, and at such time or times as may be ordered, and on the same terms and conditions, and at the same rates, and of the same kind and quality, all the granite which may be required for the exterior walls of the superstructure of said building when the construction of any additional part thereof shall be authorized; and the party of the first part, acting for and in behalf of the United States, doth covenant and agree to pay or cause to be paid by the United States unto the said parties of the second part, or to their heirs, executors, administrators, and assigns, in lawful money of the United States, the sum of one dollar and $\frac{45}{100}$ ($1.45) per cubic foot for every cubic foot in stones delivered and accepted under this contract whose quarried dimensions do not exceed eighty (80) cubic feet, and for stones of greater dimensions the following prices: One dollar and $\frac{50}{100}$ ($1.50) per cubic foot for all stones whose quarried dimensions exceed eighty (80) cubic feet and do not exceed one hundred (100) cubic feet; one dollar and $\frac{60}{100}$ ($1.60) per cubic foot for all stones whose quarried dimensions exceed one hundred (100) cubic feet and do not exceed one hundred and thirty (130) cubic feet; one dollar and $\frac{70}{100}$ ($1.70) per cubic foot for all stones whose quarried dimensions exceed one hundred and thirty (130) cubic feet and do not exceed one hundred and fifty (150) cubic feet; one dollar and $\frac{85}{100}$ ($1.85) per cubic foot for all stones whose quarried dimensions exceed one hundred and fifty (150) cubic feet and do not exceed one hundred and seventy (170) cubic feet; one dollar and $\frac{90}{100}$ ($1.90) per cubic foot for all stones whose quarried dimensions exceed one hundred and seventy (170) cubic feet and do not exceed one hundred and eighty (180) cubic feet; one dollar and $\frac{95}{100}$ ($1.95) per cubic foot for all stones whose quarried dimensions exceed one hundred and eighty (180) cubic feet and do not exceed one hundred and ninety (190) cubic feet, and two dollars ($2.00) per cubic foot for all stones whose quarried dimensions exceed one hundred and ninety (190) cubic feet, the stones to be furnished according to schedules of net sizes, to be furnished by the party of the first part, one (1) inch to be added to said schedule sizes for every worked face for quarry dimensions.

And the parties of the second part further agree to cut (including Lewis holes), dress, and box before transportation to the site of the building all the granite as aforesaid in such manner as may be directed by the party of the first part and to his entire satisfaction, it being understood that the stone-cutting work upon the stone of the third story, to be cut and dressed, shall be of the quality known as the best quality, eight (8) cut work, and equal in quality and

grade to the cutting upon a sample stone to be furnished by the party of the first part; and, further, that the said work, together with all moldings, enrichments, and carvings, shall be in accordance with the plans of said building, and shall be executed, together with the boxing thereon, as required by the party of the first part and to his entire and complete satisfaction; and it is further agreed that the party of the first part or his authorized agent at such quarry shall inspect all stones after they are cut and dressed and before they are shipped, and shall determine whether they come up to the standard cutting, both in dimensions and quality of cutting, and shall determine whether the stone is of the proper texture, color, and grain and is properly boxed, and his decision shall be final, and for this purpose the party of the first part or his authorized agent shall be afforded all necessary and proper facilities; and it is further understood and agreed that the party of the first part assumes all risk of damage to cutting on said stone while being transported to the site of said building, provided such damage does not result from the carelessness or negligence of the said parties of the second part.

And the party of the first part, acting for and in behalf of the United States, doth covenant and agree to pay or cause to be paid unto the said parties of the second part, in lawful money of the United States, the following sums for the cutting, dressing, and boxing of the said granite, to wit:

3rd story:

	Per cubic foot.
Course A, base	$6 75
Course A, base, balusters	11 54
Course B, die	7 00
Course B, balusters	54 40
Course C, cap	11 50
Course C, capping	17 65
Course D, ashlar	2 50
Course D, pilaster bases	16 00
Course D, col. bases	18 00
Course D, pilaster shafts	4 80
Course D, col. shafts	5 27
Course D, col. caps	86 07
Course D, cor. pilaster caps	83 54
Course D, pilaster caps	81 65
Course D, internal angle caps	55 81
Course D, window jamb	7 50
Course D, window consoles	14 24
Course D, window caps	7 75
Course E, window architraves	6 50
Course F, ashlar	2 50
Brackets, ordinary	10 76
Brackets, corner	10 88
Course G, dentil	17 10
Course H, cornice	6 86

All of the above prices per cubic foot to be paid upon quarry dimensions. And it is further understood between the parties aforesaid that if the market rate of wages of stone-cutters, as ascertained by the Secretary of the Treasury, shall at any time during the execution of this contract exceed three dollars and fifty cents ($3.50) per diem, then for each increase of twelve and one-half (12½) cents per diem in the wages beyond three dollars and fifty cents
31 ($3.50) per diem the prices for cutting as above agreed upon shall be increased by 3 per centum: Provided, however, That the United States may, at its option, pay the above increase or suspend the cutting of the stone under this contract until the prices of stone-cutters' wages shall have fallen to three dollars and fifty cents ($3.50) per diem; and it is further understood and agreed that payments for the granite furnished and cut, dressed, boxed, and delivered in perfect good order and as aforesaid upon the site of the said building, at St. Louis, Missouri, shall be made by the party of the first part in the following manner, to wit, ninety per centum (nine-tenths) of the cost, as above, as rapidly as the stones are delivered as aforesaid at the site of the building: Provided, however, That eighty per centum of the cost of the cutting upon such blocks of stone as shall have been cut, dressed, boxed, and ready for shipment to the site of the building and are still in the stone-cutting yards at Hurricane Island upon the last day of each calendar month will be paid by the party of the first part, said payments to be deducted from the payments that will become due when the stones are delivered upon the site of the building.

And it is further agreed that ten per centum (one-tenth) of the cost as aforesaid is to be retained until the completion of the entire order or schedule and the completion of the contract and the approval and acceptance of the same by the party of the first part, which amount of ten per centum shall be forfeited by the parties of the second part in the event of the non-fulfillment of this contract to the entire satisfaction of the party of the first part.

* * * * * * *

It is hereby understood and agreed by and between the parties to the annexed contract, bearing date September 17, 1877, that the clause therein relating to the prices to be paid for cutting, dressing, lewising, and boxing granite for the third story of the United States custom-house, court-house, and post-office building at St. Louis, Mo., is amended by adding thereto the following prices for cutting, dressing, lewising, and boxing the granite required for the fourth or attic story of the aforesaid building, viz:

Course a, base, per cubic foot	$3 75
Course a, baluster base, per cubic foot	5 24
Course b, die base, per cubic foot	4 80
Course b, balusters, each	40 00
Course b, baluster cappings, per cubic foot	11 39
Course b, pilaster bases, per cubic foot	9 72
Course b, column bases, per cubic foot	12 00
Course b, brackets, per cubic foot	7 29

Course b, window jambs, per cubic foot	$6 37
Course b, ashlar, per cubic foot	2 50
Course b, pilaster shafts, per cubic foot	4 80
Course b, column shafts, per cubic foot	5 25
Course bb, dentil, per cubic foot	14 70
Course c, impost, per cubic foot	8 00
Course c, carvings on caps, each	20 00
Course d, spandrels, per cubic foot	5 00
Course d, keystones, each	55 00
Course d, blocking course, per cubic foot	2 50
Course e, architrave, per cubic foot	5 50
Course f, bed-mould, per cubic foot	9 00
Course f, saffit stones, per cubic foot	2 50
Course — and g, cornice (including all cornices) per cubic foot	7 75
Course h, pedestal base, per cubic foot	4 00
Course i, die, per cubic foot	2 50
Course k, capping, per cubic foot	5 50

II.

In performance of the first of said contracts the claimants delivered at the site of said building, in the city of Saint Louis, dressed granite, the cost of the cutting of which, under said contract, was $1,465,323.43. All of said granite was transported by sea from Hurricane Island, in the State of Maine, to Baltimore, in the State of Maryland, and thence by railway to Saint Louis. Of said granite, a part was transported from Hurricane Island to Baltimore on deck and the residue under deck—the cost of the cutting of the transported on deck, $488,524.03, and of that transported under deck, $976,799.40.

32 III.

The reasonable price and value of marine insurance on said granite from Hurricane Island to Baltimore was, for the part on deck, 4 per cent. on the value thereof, and was, at that rate, $19,542.12 on the cost of cutting; and for the part under deck 1½ per cent., and was $14,651.92 on the price of the cutting. No part of said insurance or 15 per cent. thereon has been paid to the claimants. No insurance was effected or paid by claimants on said granite.

IV.

On the 9th day of December, 1877, the schooner Catawamteak sailed from Hurricane Island for Baltimore with a cargo of granite cut and dressed under said contracts. The entire value of the cargo was $54,623.84. The value of the raw stock was $2,662.25, and the value of the cutting was $51,961.59. On the 4th day of January, 1878, she was wrecked on Point No Point, in the Chesapeake Bay, where, a part of her cargo having been removed, she remained until January 14, 1878, when she was taken in tow for Baltimore by wreckers employed by her master, and said cargo was saved.

V.

The claimants advanced the entire cost of saving said granite, including both the raw stock and the cutting. Said cost amounted, in the aggregate, to the sum of $1,060. The amount of general average on the rough stock was $60; on the cutting, $1.000. The evidence does not show any average on the vessel. No part of said general average on the cutting advanced by the claimants has ever been repaid by the defendants.

VI.

On the 1st day of November, 1877, the schooner Joseph Farwell sailed from Rockland, near Hurricane Island, in the State of Maine, with a cargo of granite cut and dressed under said second contract. The entire value of this cargo was $23,681.87. The value of the rough stock was $2,206.11, and the value of the cutting was $21,475.76. On or about the 8th day of November, 1877, said schooner collided with the steamer John H. Starin, near Hart Island, in Long Island Sound, and was sunk in deep water. Said cargo was raised by wreckers employed by the master of the said schooner, and was forwarded by the schooner Luella A. Snow to Baltimore. The work of raising it was completed on or about the 18th day of January, 1878.

VII.

The claimants advanced for saving said granite, including both the stock and the cutting, $2,185.31. For the cutting they paid the sum of $1,800 as the Government's part of the general average of the schooner Joseph Farwell, and the owners of the vessel agreed to deliver or assign to claimants, upon their request, any vouchers or power of attorney to enable them to collect of the Government its share of the general average. No part of said general average on the cutting has been paid by the defendants.

33

VIII.

In saving the schooner Catawamteak the supervising architect of the Treasury Department refused to contract to get the vessel off or to sign an average bond.

IX.

Whatever claim of salvage the wreckers may have had against the United States the same was never assigned or transferred to the claimants. Nothing has been paid by the United States on account of the outlay.

X.

Nothing has been paid by the United States to claimants as special compensation for the sea risk they incurred.

XI.

It is not shown that the boxing on the stone was greater or even equal in weight to the surplus stone cut off at Hurricane Island, and which, but for the cutting there, would have been transported by claimants to Saint Louis. It does not appear that claimants paid any freight on the boxing, or that they paid freight on anything but the actual weight of the stone.

XII.

Under the second contract the cost of transportation per ton to Rockland was 50 cents (65, p. 72), and (2,979 tons for $22,653.55) from Rockland to Saint Louis $8.20 per ton (p. 152).

XIII.

The claimants never paid anything additional to the contract prices for transportation of the boxing. The boxing amounted to 190 tons; price per ton of transportation, $10.57.

XIV.

Hurricane Island is off the coast of Maine, about 12 miles from Rockland, the nearest outward point.

XV.

It does not appear that the unloading and reloading of the granite at the site of the building was at the instance or by the fault or neglect of the Government.

Conclusion of Law.

Upon the foregoing findings of fact the Court decides as conclusion of law that the claimants have no right to recover, and the petition will be dismissed.

34 IV.—*Opinion of the Court.*

WELDON, *J.*, delivered the opinion of the Court:

In this case the claimants seek to recover a balance due them, as they allege, upon two contracts made between them and the defendants in 1873 and 1877, as set forth in finding I.

The second contract is a modification of the first and changes the legal liabilities of the parties as to some of the details of the subject-matter of the agreements.

Four items of claim are made by the allegations of the petition and sought to be maintained by the evidence:

First. Insurance on the value of the cutting of the stock furnished under the first contract.

Second. Expenses paid by the claimants in rescuing vessels wrecked in the transportation of stone under the second contract from Hurricane Island to the city of Baltimore.

Third. The cost of transportation of boxing used in the shipment of Stone from Hurricane Island to the city of Saint Louis, the claimants alleging that said boxing was wholly for the benefit of the United States, in the protection of the cutting, and not in the protection of the rough stock.

Fourth. Expenses incurred in Saint Louis in unloading, handling, and reloading granite shipped by the direction of the agent of the defendants at Hurricane Island to the site of the building.

The first item is the most important, amounting, as the petition alleges (including the 15 per cent. profit), to the sum of $43,032.27.

Hurricane Island is situated a few miles off the coast of Maine, the nearest railroad point being Rockland.

The material under the first contract was shipped from the island to the city of Baltimore and thence by rail to the city of Saint Louis. Under the second contract the most of the material was transported by water to Rockland and thence by rail to Saint Louis.

The value of the cutting on which the claimants seek to recover marine insurance, as shown by the finding, was $1,465,323.43. The average cost of insurance where the granite was carried on deck was 4 per cent., and where it was carried below deck was 1½ per cent.

The value of the cutting carried on deck, and on which the insurance was 4 per cent., was $488,574.03. The value of the cutting below deck, and on which the value of the cutting was 1½, was $976,799.40, which, being increased by the profit of 15 per cent., makes the aggregate something less than the amount claimed by the petitioners.

The findings show that the claimants paid no insurance on either the rough stock or cutting embraced in and furnished under the agreement of April, 1873, but they insist that it is a part of the compensation to be paid them under that contract, and it is wholly immaterial that they assumed the risk themselves. It is insisted by the defendants that neither the rough rock nor the cutting comes within that clause of the agreement which provides for insurance. The clause of the contract affecting the question of insurance is as follows:

> The parties of the second part covenant and agree to and with the party of the first part to furnish from their quarry at Hurri-
> 35 cane Island, State of Maine, and deliver at the site of the aforesaid building, as much gray granite as may be required by the plans to be adopted by the Treasury Department for said building.
>
> And the parties of the second part hereby agree to furnish all the labor, tools, and materials necessary to cut, dress, and box at the quarry all the granite aforesaid in such manner as may be directed by the party of the first part.
>
> And the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid to the said parties of the second part, or to their heirs, ex-

ecutors, administrators, or assigns, in lawful money of the United States, the full cost of the said labor, tools, and materials, and insurance on the same, increased by fifteen (15) per centum thereof.

And the said parties of the second part further agree to cut, as well as furnish and deliver, all granite herein contracted for at such times as may be required by the said party of the first part.

If the insurance mentioned by the agreement is an insurance on the increased value of the stone because of cutting, and thereby becomes one of the ingredients or elements of the compensation to be paid the claimants, then it may be the petitioners have the right to recover upon the theory of the petition, and it is wholly immaterial whether they actually insured or not.

In that view they had the right to take the risk themselves, and, the insurance being a part of their compensation, their right to recover such part is not defeated by the fact that they did not pay insurance to third parties.

The substance of the contract is the parties of the second part agreed to furnish all the labor, tools, and materials necessary to cut, dress, and box at the quarry the granite, and the parties of the first part agree to pay the full cost of said labor, tools, and materials, and insurance on the same, increased by 15 per centum thereof.

The materials mentioned in the first part of the undertaking, and which the claimants were bound to furnish, are "materials necessary to cut, dress, and box" the granite at the quarry, and the word "materials," when used in the latter part of the undertaking, and upon which insurance is to be paid, it is insisted by the Government, refers to and describes the materials mentioned in the first part of the agreement.

It is contended by the claimants that the words materials as used in the latter part of the agreement, and to which the words "and insurance on the same" attach, is the material of the stone increased by the labor of cutting.

We have carefully examined the structure of the contract as made by its words, and we deduce from the terms used and structure of the covenant that the insurance contemplated by the agreement was not the worth of insurance on the cutting, and, there being no finding as to the cost of insurance upon any other value than the cutting, the petitioners are not entitled to recover upon that branch of their petition.

Under the original and modified contracts it was the duty of the claimant to deliver the stone at the site of the building in the city of Saint Louis, and it makes no difference whether, under either or both, the property in the stone in its improved form was in the claimants or defendants at the time it was started from the quarry and during its transportation.

The modified contract provides "that the parties of the second part covenant and agree with the party of the first part to furnish from their quarry at Hurricane Island, State of Maine, and deliver
at the site of the aforesaid building, such pieces of granite as
36 may be required for the exterior walls of the building aforesaid as may be designated by the party of the first part, and to cut, dress, and box the same."

It is provided in the original contract that the party of the second part is "to furnish from their quarry at Hurricane Island, State of Maine, and deliver at the site of the aforesaid building as much granite as may be required by the plans adopted by the Treasury Department.

It being the duty of the petitioners to deliver the stone at Saint Louis, they took upon themselves, by the terms of their agreement, all the labor and expense incident to the transportation, and if in the transportation any accident happened to the stone, increasing the cost of transportation, such cost must fall upon them as incident to the performance of the contract on their part.

This construction of the obligation of the parties disposes of the liability of the Government as to the claim of the petitioners for contribution to the expenses of saving the cargoes of two vessels employed in the transportation of the stone from Hurricane Island to Baltimore.

The next item of claim is for the cost of transportation of the boxing from the quarry to the site of the building, but as the findings show no charges were made for the boxing it is not conceived how the Government can be made responsible to the claimants for an item of that kind.

It is not necessary to determine as to what was the duty of the claimants to furnish transportation for boxing, it being sufficient to determine as a fact that no freight was paid for such boxing.

As to the item of $322, the Court does not find it sustained by the proof, and upon the whole case it is the judgment of the Court that the petition be dismissed.

37 *V.—Final Judgment of the Court.*

At a Court of Claims held in the city of Washington on the 6th day of April, A. D. 1885, judgment was ordered to be entered as follows:

The Court, on due consideration of the premises, find for the defendants, and do order, adjudge, and decree that the petition of the claimants, Davis Tillson and William C. Kingsley, partners under the firm name of The Hurricane Island Granite Company, be dismissed.

38 *VI.—Application of Claimants for and Allowance of Appeal.*

DAVIS TILLSON and WILLIAM C. KINGSLEY, Copartners Trading under the Style of The Hurricane Island Granite Company,
vs.
THE UNITED STATES.
} No. 13399.

Now come the claimants, by Paine and Ladd, their attorneys, and apply for an appeal to the Supreme Court of the United States from the judgment rendered herein by the Court of Claims.

PAINE AND LADD,
Claimants' Att'ys.

[Endorsed:] Filed May 16, 1885.

AT CHAMBERS.

Allowed May 16th, 1885.

WILLIAM A. RICHARDSON,
Chief Justice.

39 In the Court of Claims.

DAVIS TILLSON and WILLIAM C. KINGSLEY, Copartners Trading under the Style of The Hurricane Island Granite Company,
versus
THE UNITED STATES.
No. 13399.

I, John Randolph, assistant clerk of the Court of Claims, hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the final judgment of the court, of the application of claimants for allowance of appeal to the Supreme Court of the United States, and the allowance of same by Chief Justice Richardson.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims, at Washington city, this 7th day of August, 1885.

[Seal of Court of Claims.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 227. Davis Tillson and William C. Kingsley, copartners trading under the style of The Hurricane Island Granite Company, appellants, *vs.* The United States. Filed February 27, 1886.

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JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Court of Claims. No. 227. Davis Tillson and William C. Kingsley, copartners trading under the style of The Hurricane Island Granite Company, appellants, *vs.* The United States. Filed February 27, 1886.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 227.

DAVIS TILLSON and WILLIAM C. KINGSLEY, Copartners, trading under the style of The Hurricane Island Granite Company,

APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLANTS.

HALBERT E. PAINE,
Attorney for Appellant.

GIBSON BROS., PRINTERS.

Supreme Court of the United States.

OCTOBER TERM, 1888.

DAVIS TILLSON AND WILLIAM C. KINGSLEY, CO-PARTNERS TRADING UNDER THE STYLE OF THE HURRICANE ISLAND GRANITE COMPANY, APPELLANTS,

v.

THE UNITED STATES.

No. 227.

APPEAL FROM THE COURT OF CLAIMS.

Brief for Appellants.

STATEMENT.

Of the facts set forth in the findings of the court of claims, as printed in the record, the following are material to this appeal:

1. The granite used by the United States in the construction of the custom-house, at St. Louis, was furnished by the appellants, under two contracts dated, respectively, April 22, 1873, and September 17, 1877; was quarried, cut, dressed, and boxed by the appellants, at their quarries on Hurricane Island, off the coast of Maine; and was trans-

ported by the appellants from Hurricane Island to St. Louis.

2. In the contract of April 22, 1873, the appellants agree "to furnish from their quarry at Hurricane Island, state of Maine," all the granite required for the construction of the custom-house; to furnish all the labor, tools, and materials necessary to cut, dress, and box, at the quarry, all the granite aforesaid; to "furnish such number of men as may, from time to time, be deemed necessary, by the party of the first part, for the proper prosecution of the work, and provide such shops, sheds, and other buildings as may be necessary for the proper performance of the work, and for the accommodation of the workmen, without cost to the government, or compensation for their use, or for the rent of the land on which they may be erected;" to "let and lease their quarry or quarries, at Hurricane Island, Maine, with all and singular the tools, buildings, wharves, and appurtenances thereto pertaining unto the said party of the first part, with the full right, authority, and power to enter upon, occupy, and use the same, or procure therefrom any or all such stones as the parties of the second part shall fail, omit, or decline to furnish;" and to deliver the granite cut, dressed and boxed at the site of said custom-house in St. Louis.

3. In the contract of April 22, 1873, the United States agree to pay specified prices, per cubic foot, for the stock, upon its delivery and acceptance at the site of said custom-house; to pay "the full cost of the said labor, tools, and materials" necessary to cut, dress and box said granite; to pay insurance on the full cost of said labor, tools and materials; and to pay fifteen per centum on the full cost of said labor, tools and materials, and on the insurance thereof.

4. In the contract of September 17, 1877, the appellants

agree to furnish, from their said quarry on Hurricane Island, the granite therein specified, and to cut, dress and box the same, and deliver it at the site of said custom-house, in St. Louis.

5. In the contract of September 17, 1877, the United States agree to pay for said stock, cutting, dressing and boxing certain stipulated prices.

6. In the contract of September 17, 1877, the United States do not agree to pay insurance on the cost of the labor, tools and materials expended in cutting, dressing and boxing the granite, but do agree to assume "all risk of damage to cutting on said stone, while being transported to the site of said building, provided such damage does not result from the carelessness or negligence of said parties of the second part."

7. Under the contract of April 22, 1873, the appellants "delivered, at the site of the custom-house, in St. Louis, dressed granite, the cost of the cutting of which, under said contract, was $1,465,323.43. All of said granite was transported by sea from Hurricane Island, in the State of Maine, to Baltimore, in the State of Maryland, and thence, by railway, to St. Louis. Of said granite a part was transported from Hurricane Island to Baltimore on deck, and the residue under deck. The cost of the cutting of that which was transported on deck was $488,524.03; and of that which was transported under deck $976,799.40." This is shown in the second finding of the court of claims.

8. "The reasonable price and value of marine insurance on said granite, from Hurricane Island to Baltimore, was for the part on deck four per cent. on the value thereof, and was, at that rate, $19,542.12 on the cost of the cutting; and for the part under deck one and one-half per cent., and was $14,651.92 on the price of the cutting." This is shown in the third finding of the court of claims.

ported by the appellants from Hurricane Island to St. Louis.

2. In the contract of April 22, 1873, the appellants agree "to furnish from their quarry at Hurricane Island, state of Maine," all the granite required for the construction of the custom-house; to furnish all the labor, tools, and materials necessary to cut, dress, and box, at the quarry, all the granite aforesaid; to "furnish such number of men as may, from time to time, be deemed necessary, by the party of the first part, for the proper prosecution of the work, and provide such shops, sheds, and other buildings as may be necessary for the proper performance of the work, and for the accommodation of the workmen, without cost to the government, or compensation for their use, or for the rent of the land on which they may be erected;" to "let and lease their quarry or quarries, at Hurricane Island, Maine, with all and singular the tools, buildings, wharves, and appurtenances thereto pertaining unto the said party of the first part, with the full right, authority, and power to enter upon, occupy, and use the same, or procure therefrom any or all such stones as the parties of the second part shall fail, omit, or decline to furnish;" and to deliver the granite cut, dressed and boxed at the site of said custom-house in St. Louis.

3. In the contract of April 22, 1873, the United States agree to pay specified prices, per cubic foot, for the stock, upon its delivery and acceptance at the site of said custom-house; to pay "the full cost of the said labor, tools, and materials" necessary to cut, dress and box said granite; to pay insurance on the full cost of said labor, tools and materials; and to pay fifteen per centum on the full cost of said labor, tools and materials, and on the insurance thereof.

4. In the contract of September 17, 1877, the appellants

agree to furnish, from their said quarry on Hurricane Island, the granite therein specified, and to cut, dress and box the same, and deliver it at the site of said custom-house, in St. Louis.

5. In the contract of September 17, 1877, the United States agree to pay for said stock, cutting, dressing and boxing certain stipulated prices.

6. In the contract of September 17, 1877, the United States do not agree to pay insurance on the cost of the labor, tools and materials expended in cutting, dressing and boxing the granite, but do agree to assume "all risk of damage to cutting on said stone, while being transported to the site of said building, provided such damage does not result from the carelessness or negligence of said parties of the second part."

7. Under the contract of April 22, 1873, the appellants "delivered, at the site of the custom-house, in St. Louis, dressed granite, the cost of the cutting of which, under said contract, was $1,465,323.43. All of said granite was transported by sea from Hurricane Island, in the State of Maine, to Baltimore, in the State of Maryland, and thence, by railway, to St. Louis. Of said granite a part was transported from Hurricane Island to Baltimore on deck, and the residue under deck. The cost of the cutting of that which was transported on deck was $488,524.03; and of that which was transported under deck $976,799.40." This is shown in the second finding of the court of claims.

8. "The reasonable price and value of marine insurance on said granite, from Hurricane Island to Baltimore, was for the part on deck four per cent. on the value thereof, and was, at that rate, $19,542.12 on the cost of the cutting; and for the part under deck one and one-half per cent., and was $14,651.92 on the price of the cutting." This is shown in the third finding of the court of claims.

9. The appellants did not employ any other insurers to bear any part of the marine risk on the cutting of said stone; nor did they pay any other insurers therefor.

10. No part of the insurance on the cutting of said stone has been paid to the appellants by the United States.

11. "On the first day of November, 1877, the schooner Joseph Farwell sailed from Rockland, near Hurricane Island, in the state of Maine, with a cargo of granite cut and dressed under the second contract (that of September 17, 1877). The entire value of this cargo was $23,681.87. The value of the rough stock was $2,206.11, and the value of the cutting was $21,475.76. On or about the eighth day of November, 1877, said schooner collided with the steamer *John H. Starin*, near Hart Island, in Long Island Sound, and was sunk in deep water. Said cargo was raised by wreckers employed by the master of said schooner."

This is shown in the sixth finding of the court of claims.

12. The appellants paid for saving said granite, including both the stock and the cutting, the sum of $2,185.31. For saving the cutting they paid the sum of $1.800; and for saving the stock the sum of $385.31. The United States have not repaid any part of said sum of $1,800.

13. "Hurricane Island is off the coast of Maine, about twelve miles from Rockland, the nearest outward point."

Argument.

The appellants demand compensation for marine insurance on that part of the value of the granite cut under the contract of April 22, 1873, which was represented by the cost of the cutting, dressing and boxing, with fifteen per centum thereon, amounting to $39,323.14. The appellants

also demand reimbursement, under the contract of September 17, 1877, for moneys paid to save from shipwreck the cutting on the cargo of the schooner *Joseph Farwell*, amounting to $1,800.

Insurance.

The contract of April 22, 1873, embraces four stipulations on the part of the appellants, and four corresponding stipulations on the part of the United States.

1. The appellants agree to furnish the granite from their quarry on Hurricane Island, off the coast of Maine.

2. The appellants agree "to furnish all the labor, tools and materials necessary to cut, dress and box, at the quarry, all the granite aforesaid."

3. The appellants agree "to furnish such number of men as may, from time to time, be deemed necessary, by the party of the first part, for the proper prosecution of the work, and provide such shops, sheds and other buildings as may be necessary for the proper performance of the work, and for the accommodation of the workmen, without cost to the government, or compensation for their use, or for the rent of the land on which they may be erected."

4. The appellants agree to deliver the granite, cut, dressed and boxed, at the site of the custom-house in St. Louis.

5. The United States agree to pay specified prices, per cubic foot, for the stock of the granite, upon its delivery and acceptance, at the site of the custom-house.

6. The United States agree to pay "the full cost of the said labor, tools and materials" necessary to cut, dress and box said granite.

7. The United States agree to pay fifteen per centum

on the cost of said labor, tools and materials, and on the insurance thereof.

8. The United States agree to pay insurance on the full cost of said labor, tools and materials.

The following clauses of the contract relate to this branch of the case :

The parties of the second part covenant and agree to and with the party of the first part to furnish *from their quarry* at Hurricane Island, state of Maine, *and deliver at the site of the aforesaid building* as much gray granite as may be required by the plans to be adopted by the treasury department for said building. * * * (Record, p. 5.)

And the parties of the second part hereby agree to furnish all the *labor, tools, and materials necessary to cut, dress, and box at the quarry* all the granite aforesaid in such manner as may be directed by the party of the first part. (Record, p. 6.)

And the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay, or cause to be paid, to the said parties of the second part, or to their heirs, executors, administrators, or assigns, in lawful money of the United States, the full *cost of the said labor, tools, and materials, and insurance on the same*, increased by fifteen (15) per centum thereof. * * * (Record, p. 6.)

And the parties of the second part further agree to furnish such number of men as may from time to time be deemed necessary by the party of the first part for the proper prosecution of the work, and provide such shops, sheds, and other buildings as may be necessary for the proper performance of the work, and for the accommodation of the workmen, without cost to the government or compensation for their use, or for the rent of the land on which they may be erected. (Record, p. 7.)

And the said parties of the second part further agree to cut, as well as furnish and deliver, all granite herein contracted for at such times as may be required by the said party of the first part, and in default thereof to forfeit and pay to the United States the sum of one hundred dollars ($100.00) per diem for each and every day thereafter until the final completion of the same, which sum shall be deducted from any moneys which may be due them; and if that amount be not due them, then their bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States. (Record, p. 7.)

And the said parties of the second part further covenant, and agree to and with the party of the first part to lease, and hereby do let and lease their quarry, or quarries, at Hurricane Island, Maine, with all and singular the tools, buildings, wharves, and appurtenances thereto pertaining, unto the said party of the first part, with the full right, authority, and power to enter upon, occupy, and use the same, or procure therefrom any or all such stones as the parties of the second part shall fail, omit, or decline to furnish. (Record, p. 7.)

The payment promised by the United States, in the fifth of these stipulations, was for the stock, and was due when the granite was delivered and accepted at St. Louis. It

did not include any compensation for the cutting. The payment promised in the sixth stipulation was for the cutting; that is to say for the labor, tools, and materials expended in cutting, dressing and boxing the granite. The payment promised in the seventh stipulation was a payment of fifteen per centum on the cost of the labor, tools, materials and insurance. This payment was not for the cost of stock, nor for the cost of cutting, nor for the cost of insurance, but was a percentage on the cost of stock, cutting and insurance, to cover the use of the appellants' costly plant, and their profits on the cutting, dressing and boxing. The payment promised in the eighth stipulation was for insurance on the value of the cutting, represented by the cost of the labor, tools and materials used in cutting, dressing and boxing the granite, and for nothing else.

This branch of the case presents four questions, as follows:

(1.) Whether, under the contract of April 22, 1873, the appellants bore the marine risk on the cut stone in transit to St. Louis.

(2.) Whether the insurance, for which the United States promised to pay, was insurance on the cost of the labor, tools and materials used in cutting, dressing and boxing the granite, or was only insurance on the *materials* used for that purpose, which materials consisted of the coal used in sharpening the tools, and the rough boards, hoop-iron and nails used in boxing the stones.

(3.) Whether the insurance, for which the United States promised to pay, did or did not include marine insurance.

(4.) Whether the United States were bound by the contract to pay for the insurance on the cutting, when the risk was borne by the appellants themselves, or only when the appellants employed other insurers to bear it.

I.

Under the contract the appellants bore the entire marine risk, not only on the stock but also on the cutting, until the delivery of the cut stones at the site of the custom-house, in St. Louis. They did not undertake, as vendors, to deliver the cut granite to the United States *on Hurricane Island;* but they undertook, as vendors, to deliver the cut granite *at the site of the custom-house, in St. Louis.* Until its delivery at St. Louis the *legal title,* both to the stock and to the cutting, remained in the appellants. Their undertaking was altogether the undertaking of vendors, and not to any extent the undertaking of carriers. If they had undertaken (1) to deliver the property to the United States, on Hurricane Island, and (2) to transport it thence to St. Louis, they would have contracted (1) as vendors, and (2) as carriers. In that case their liability, for loss or damage resulting from the perils of the sea, would only have been such as the law imposes on common carriers. In the absence of fault, or contributory negligence, they would not have been liable at all. The risk would have been borne by the United States. But as vendors they undertook to deliver the property—the cut stone, the stock and the cutting—at St. Louis. Every risk to which the property might be exposed, before its delivery to the purchasers in St. Louis, was their risk.

If the appellants had agreed, as vendors, to deliver the property on Hurricane Island, and then, as carriers, to transport it to St. Louis, and had failed to deliver it at St. Louis, proof of shipwreck would have constituted a good defence to an action on the contract. But to such an action, under the agreement which they actually made, as vendors, to deliver the property at St. Louis, proof of

shipwreck would have constituted no defence at all. The appellants would have been bound either to replace every cut stone lost, or to repay to the United States the full cost of the cutting, dressing and boxing, and to lose the entire price of the stock, which was to become due upon the delivery of the property at St. Louis.

The following are the provisions of the contract which relate to the point now under consideration:

The parties of the second part covenant and agree to and with the party of the first part to furnish from their quarry at Hurricane Island, state of Maine, and deliver at the site of the aforesaid building, as much gray granite as may be required by the plans to be adopted by the treasury department for said building. (Record, p. 5.)

And the parties of the second part further agree to furnish and deliver said granite at such times and in such quantities as may from time to time be ordered by the party of the first part, and that the granite shall be of the best quality to be obtained from their quarry aforesaid, and of uniform color, free from flaws, stains or discoloring matter, and to the entire satisfaction of the party of the first part; the stones to be furnished according to schedules of net sizes to be furnished by the party of the first part, one inch to be added to said schedule sizes for every worked face for quarry dimensions. (Record, p. 5.)

And the parties of the second part hereby agree to furnish all the labor, tools, and materials necessary to cut, dress, and box at the quarry all the granite aforesaid, in such manner as may be directed by the party of the first part. (Record, p. 6.)

And the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid, to the said parties of the second part, or to their heirs, executors, administrators, or assigns, in lawful money of the United States, the full cost of the said labor, tools and materials and insurance on the same, increased by fifteen (15) per centum thereof. (Record, p. 6.)

And the said parties of the second part further agree to cut, as well as furnish and deliver, all granite herein contracted for at such times as may be required by the said party of the first part, and in default thereof to forfeit and pay to the United States the sum of one hundred dollars ($100.00) per diem for each and every day thereafter until the final completion of the same, which sum shall be deducted from any moneys which may be due them; and if that amount be not due them, then their bondsmen are to be held liable for any deficiency, to be recovered of them by suit in the name of the United States. (Record, p. 7.)

The appellants, then, in effect became insurers on the cutting of this stone, to its full value, and against all risks. No broader or more exhaustive liability could possibly be assumed, by an insurer, than was assumed, by the appellants, in this case.

It is proper, at this point, to call the attention of the court to the peculiar relations which the parties sustained to this property. While it is true that the appellants held the legal title, both to the stock and to the cutting, until the delivery and acceptance of the granite, at the site of the custom-house, in St. Louis, it is also true that, before the shipment of the granite, the United States had become the equitable owners of the cutting, the value of which was more than eight times that of the stock. For the United States had, before such shipment, paid the "full cost of the labor, tools and materials" expended in cutting, dressing and boxing the stones. It resulted, therefore, that when the appellants assumed all the risks to which the stock and cutting were exposed, in transit, the whole of the value of the cutting at risk was the equitable property of the United States; so that, to the extent of the entire value of the cutting, these risks were in fact borne by the appellants for the benefit of the United States. And for that reason the United States stipulated to pay the appellants for insurance on the cutting, or, what is the same thing, for insurance on the cost of the labor, tools, and materials expended in the cutting of the stone.

II.

The appellants contend that the insurance, for which the United States agreed to pay, was insurance on the cost of the labor, tools and materials used, that is to say on that part of the value of the cut stone which was represented by the cost of the labor, tools and materials used in cutting and boxing the granite.

The court of claims and the assistant attorney-general differed in their views of the liability of the United States, under the contract of April 22, 1873. The attorney-

general conceded that the United States were liable to the appellants, to the extent of premiums actually paid by them, to insurance companies, for insurance on the cost of the labor, tools and materials, used in cutting and boxing the granite; but he insisted that, inasmuch as the appellants had merely borne the risk themselves, and had not employed other insurers to bear it, the United States were not liable. On the other hand, the court of claims held that, so far as the liability of the United States was concerned, it was immaterial whether the appellants bore the risk themselves, or paid others for bearing it. But then the court at the same time held that the obligation, imposed by the contract upon the United States, was to pay insurance only on the *materials* used in cutting, dressing and boxing the stone, that is to say on the charcoal used by the blacksmith, in sharpening the tools, and on the rough boards, hoop-iron and nails used for the boxing. The court held that payment for insurance on the cost of the labor and materials, which entered into the cutting, was not provided for in the contract. The attorney-general conceded that the United States were bound to reimburse the appellants for moneys paid, for such insurance, to other insurers, but denied the existence of any obligation to pay for the insurance, when the appellants themselves bore the risk. The following is the language of the court of claims: (Record, p. 31.)

> If the insurance mentioned by the agreement is an insurance on the increased value of the stone, because of cutting, and thereby becomes one of the ingredients or elements of the compensation to be paid the claimants, then it may be the petitioners have the right to recover upon the theory of the petition, and it is wholly immaterial whether they actually insured or not. In that view they had the right to take the risk themselves; and, the insurance being a part of their compensation, their right to recover such part is not defeated by the fact that they did not pay insurance to third parties.
>
> The substance of the contract is, the parties of the second part agreed to furnish all the labor, tools and materials necessary to cut, dress and box at the quarry the granite; and the parties of the first part agreed to

pay the full cost of said labor, tools and materials, *and insurance on the same*, increased by fifteen per centum thereof. The materials mentioned in the first part of the undertaking, and which the claimants were bound to furnish are "materials necessary to cut dress and box the granite at the quarry, and the word "materials," when used in the latter part of the undertaking, and *upon which insurance is to be paid*, it is insisted by the government, refers to and describes the materials mentioned in the first part of the agreement. * *

We have carefully examined the structure of the contract as made, by its words, and we deduce from the terms used and structure of the covenant that the insurance contemplated by the agreement was, not the worth of insurance on the cutting; and, there being no finding as to the cost of insurance upon any other value *than* the cutting, the petitioners are not entitled to recover upon that branch of their petition.

The appellants contend that the court of claims erroneously interpreted the contract between the parties. They contend that the United States stipulated to pay insurance not merely on the materials used in cutting, dressing and boxing the granite, but on the aggregate cost of the labor, tools and materials used in such cutting, dressing and boxing. In support of their interpretation of the contract they submit the following considerations:

The cost of the cutting, as distinguished from the cost of the stock, includes three elements, (1) the cost of the labor expended in cutting and boxing the stone, (2) the cost of the tools used, and (3) the cost of the materials used, which were coal, rough boards, hoop-iron and nails. The cost of the cutting and the cost of the stock, added together, constituted the total value of the stones. The United States stipulated to pay "the full cost of the said labor, tools and materials and insurance *on the same*." In order to ascertain the subjects of the insurance, which the United States promise to pay, it is only necessary to know for what nouns the pronoun "*same*" stands, in this stipulation. If that pronoun stands for the *labor*, *tools* and *materials*, all together, or for the *cost* of the labor, tools and materials, all together, then the appellants' interpretation of the contract must be correct. That the word "*same*" does refer, either to the labor, tools and materials,

all together, or, what is the same in effect, to the cost of the labor, tools and materials, all together, is absolutely certain. The syntax of the stipulation excludes any other possible interpretation. To restrict the reference of the word "*same*" to the materials alone in the promise to pay "the full cost of the said labor, tools, and materials, and insurance on *the same*," would be to wrench, with violence, plain, clear, unambiguous English from its necessary meaning.

If the parties had intended to restrict the insurance, for which the United States were to pay, to the materials alone, the stipulation would have been to pay "the full cost of the said labor, tools and materials, and insurance on said *materials*." If they had intended to restrict the insurance to the materials and tools (to the exclusion of the labor), the stipulation would have been to pay "the full cost of said labor, tools and materials, and insurance on said *tools and materials*." But inasmuch as they intended to provide for payment for insurance on the cost of the labor, tools and materials, *all together*, they used the word "same," which, as a grammatical necesssity, stands for the cost of the labor, tools and materials, all together.

The parties made their own contract; and it must stand as they made it. Neither party was an idiot, lunatic or minor. Neither party was under duress. The United States were not deceived or misled. The contract was drawn, as such contracts always are drawn, by the agents of the United States. The court will not make a new contract for the accommodation of the government. The accepted canons of interpretation require the court to adopt the plain and necessary meaning of this unambiguous language, and to refer the word "*same*" either to the words "labor, tools and materials," all together, or, what is the same thing, to the word "cost."

But if it were competent for the court to make a new contract for the parties, it would be impossible to find, in the equities of the case, any reason, or excuse, for giving to the agreement such a form as to impose upon the appellants the obligation to carry, without compensation, the risk on the cost of the labor incorporated into the cutting of this granite. To assume that the word "*same*" refers only to the materials is not merely to do violence to the syntax of the contract, but to taint its stipulations with the most absurd injustice. Upon this assumption the stipulation to pay is restricted to insurance on the coal, rough boards, hoop-iron and nails amounting in value to a contemptible sum. To provide for such an insignificant risk, and to overlook, at the same time, the main risk in the transaction, which was the risk on the cost of the labor incorporated into the cutting of the stone, amounting to more than a million of dollars, would have been a most unaccountable sacrifice of essentials to mere trifles.

Without this stipulation for the payment of insurance on the value of the cutting, the contract would have been very hard and hazardous for the appellants. For it required them to cut and dress the stones, at the quarry, and then to deliver the stones, cut and dressed, at the site of the building; it required them, in effect, to replace all cut stones lost by shipwreck with other stones of like cutting and value. It required them to bear all losses on the cutting. It required them to insure the value of the cutting against all loss and damage. In the absence of a stipulation by the United States to pay the appellants for insurance on the cutting, the appellants would have been compelled to carry gratuitously very heavy risks. The aggregate value of the stock, cut under the contract of April 22, 1873, was only $174,790.19; but the aggregate value of the cutting thereon was $1,465,323.43; and the

appellants actually carried a marine risk, for the United States, amounting to more than a million of dollars. In case of successive losses the United States could have recovered every dollar of that amount, by reservations from subsequent payments, or by proceedings in the courts.

The attorney-general said :

> And there is really no hardship, for claimants neither paid out any money for insurance of the property in question nor did they have a single loss on the property. It cost them nothing either to insure or not to insure.

The errors in this statement are obvious and radical. It is evident that the consideration which moves from the insurer to the insured, in all insurance contracts, is wholly overlooked. That consideration is the bearing of the risk by the insurer. It would be a novel answer for a shipper or consignee to make to a demand for premiums by an insurance company, on the completion of the voyage, that no loss had occurred, that the company had paid nothing for insurance to others, and therefore it was no hardship for the company to lose the premiums. If the attorney-general should attempt, in his private business, to deal with an insurer as he seeks to deal with the appellants in this business of the government, his enterprise would be very promptly and summarily repressed in the courts. He would learn that the demand of his insurer, who had made himself liable, for a specified time or voyage, to make good losses on property of the insured, could not be settled in the courts by a suggestion that no loss had in fact occurred. So far as his obligation to pay the insurance money is concerned, it would be quite immaterial whether a loss had or had not occurred. And it would be an indefensible outrage if a court should hold that an insurer who had borne the risk should not be paid for bearing it, on the ground that no loss had occurred.

The attorney-general contended that the compensation

fixed for the cutting and for the stock was intended to be "adequate compensation for all the obligations assumed in the contract." This is not true. Exactly the opposite is true. The compensation fixed for the cutting was intended to be adequate for the cutting. The compensation provided for the stock was intended to be adequate for that. But for the risk on the cutting, which was imposed by the contract on the appellants, the payment for insurance, and nothing else, was intended to be a compensation. The position of the attorney-general is not supported by the terms of the contract, but, on the contrary, is absolutely destroyed by the terms of the contract. The appellants, as the consideration for the stipulated payment of insurance, assumed, and until the granite reached St. Louis, bore risks which amounted, in the aggregate, to $1,421,363.72. If all or any of the stones had been lost, in transit, the appellants could have been compelled either to deliver, at St. Louis, duplicates of the lost stones, without charge for cutting such duplicates, or to pay the damages consequent, under the contract, upon a failure to make such deliveries. The price fixed in the contract, for the stock, was not intended to include, to any extent, compensation for bearing this risk. Nor was the payment stipulated for the cutting intended to include any compensation for bearing this risk. That the payment of fifteen per centum stipulated in the contract was not intended to include any compensation for this insurance is absolutely certain. For the parties expressly stipulated that this percentage should be computed on the cost of the insurance, as well as on the cost of the labor, tools and materials. Not only was the fifteen per centum to be paid in addition to the insurance, but the insurance was actually made one of the items on which the fifteen per centum was to be computed.

It is necessary to digress for a moment, at this point, to

correct a most remarkable inaccuracy of statement in the opinion of the court of claims, which occurs in the following paragraph (Record, p. 31):

> It is contended by the claimants that the word materials, as used in the latter part of the agreement, and to which the words "and insurance on the same" attach, is the material of the stone increased by the labor of cutting.

The claimants did not either in the original petition, or in the amended petition, or in either of their briefs, or in the oral argument, make any contention resembling, in the remotest degree, that which is imputed to them in this paragraph of the opinion of the court of claims. On the contrary, from the beginning to the end of the case in the court of claims, they contended, as they contend here, for payment for insurance upon the value of the cutting as represented by the cost of the labor, tools and materials used in cutting, dressing and boxing the stones. They did not contend for payment for insurance on the "material of the stone," which is the rough stock. They expressly and repeatedly disclaimed any right to compensation for insurance on the rough stock. So far as the insurance was concerned they discriminated, at every stage of the case between the cutting and the stock.

III.

It being assumed that, in the contract of April 22, 1873, the United States agreed to pay the appellants for insurance *of some kind* on that part of the value of the cut stone which was represented by the cost of the cutting and boxing, the next question is for *what kind* of insurance on the cutting the United States promised to pay the appellants. In the court below the attorney-general conceded that the insurance, for which compensation was provided in the contract, was marine insurance, but de-

nied the right of the appellants to any compensation when the risk was carried by themselves and not transferred to other insurers. He conceded the appellants' right to recover premiums paid to others, but denied their right to compensation for insuring the cutting themselves. The court of claims not only concluded that the insurance, for which the United States stipulated to make compensation, was marine insurance, but also concluded that it was immaterial whether the appellants bore the risk themselves or employed others to bear it. At the same time they also held that the only property covered by the insurance stipulation was the materials used in cutting and boxing the granite.

The contract required the granite to be quarried, cut and boxed on Hurricane Island, off the coast of Maine. It was to be delivered at the city of St. Louis, on the Mississippi river. It was therefore a necessity that it should be transported either wholly or partly by water. The risk which the appellants assumed by the contract of April 22, 1873, so far as the cutting was concerned, was the entire risk of damage and loss of every kind. They bound themselves to replace every cut stone that should be damaged or lost, no matter how the damage or loss should be incurred. The risk which they assumed included the marine risk, the fire risk, and all risks of collision or other accident in transportation on land by railroad or otherwise. They in fact insured the United States against any and all loss and damage to the cutting of the stone, whether on the water or on the land. But the only real risk was the marine risk. The other risks were merely nominal. The danger of damage to the cutting by fire, whether at the quarry on Hurricane Island, or on the schooners employed in the water transportation, or on the railway trains on which the cut stones were transported from the seaboard to St. Louis,

was so insignificant that a stipulation to pay for that kind of insurance would not have been worth the time, paper and ink consumed in writing it out. On the other hand the danger of loss or damage by shipwreck was real; and between private parties a provision for marine insurance would have been expressed or implied as a matter of course. The appellants submit that it is a just and reasonable interpretation of the contract to hold that by the promise to pay insurance on the cutting of this stone, the officers of the United States intended to assume an obligation to pay for insurance against such risks to the cutting as the contract imposed on the appellants, and that inasmuch as the main risk assumed by the appellants was the marine risk, the main insurance for which the United States promised to pay was marine insurance. The contract, if fire risks only had been contemplated, would really have provided for no insurance at all, except on the rough boards in store at the quarry to be used for boxing, and on the coal to be used by the blacksmiths in sharpening the tools. The value and risk of these articles were not sufficient to warrant so much consideration in the contract. The iron hoops, the steel hammers, drills and chisels, and the cutting on the granite, were evidently safe from fire at the quarry. A provision in the contract for insuring them against fire at the quarry would have been absurd in the extreme. The insignificance of the fire risk in this case, as compared with the marine risk, excludes the inference that the insurance provided for in this contract was fire insurance only. Argument on a point so clear would seem to be superfluous. The mere statement that the contract necessarily covered marine insurance ought to suffice.

But then it is evident from the nature and subject of the contract that the term "insurance," as therein used,

embraced marine insurance. In a lease of a house the term "insurance," if undefined, is of course to be construed as referring to fire insurance. In a charter-party it is to be construed as referring to marine insurance. This contract provided for the transportation of granite from an island in the sea, off the coast of Maine, to the city of St. Louis, on the west bank of the Mississippi river. It could not have been moved forty rods from the quarry towards the place of destination, without water transportation. It could not have been delivered at St. Louis, without ruin to the appellants, unless transported largely by water carriage. The only possible loss by fire on the island was the loss of the boards which were to be fastened to the stones for the protection of their corners in transit, and of the blacksmith's coal. To restrict the term "insurance," in this contract, to fire insurance would be as absurd as it would be to restrict the term "insurance," in the lease of a farmer's barn, to marine insurance, or to restrict the term, in a charter-party, to a fire risk.

In the United States, as well as in England, marine insurance, at the present time, embraces fire risks. Fire is always mentioned in the marine policy as one of the perils of the sea. Indeed it is possible that, since the enactment of the federal statute of March 3, 1851, fire has been one of the perils of the sea covered by marine insurance, whether specified or not specified as such in the policy of insurance. Since that law took effect the risk of loss of goods by fire, on the sea, has not been borne by the carrier. The provision of the act of March 3, 1851, is:

That no owner, or owners, of any ship, or vessel, shall be subject, or liable to answer for, or make good, to any one or more person or persons, any loss or damage, which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship, or vessel, by reason or by means of any fire happening to, or on board, the said ship, or vessel, unless such fire is caused by the design or neglect of such owner, or owners: *Provided*, That nothing in this act contained

shall prevent the parties from making such contract as they please extending or limiting the liability of ship-owners.

But then it is practically immaterial whether this statute does or does not make fire one of the perils of the sea, when not specified as such in the policy. For the fact is that fire is now specified as one of the perils of the sea in all marine policies. If, therefore, the appellants, instead of carrying the whole fire and marine risk themselves, had seen fit to employ insurance companies to carry the whole or a part of it, they would not have taken out fire policies, but would have taken out marine policies specifying fire as among the perils of the sea.

IV.

The next question is whether the United States were bound, by the contract, to pay for the insurance, when the risk was carried by the appellants themselves, or only when they employed other insurers to carry it. The court of claims held that if the contract made the United States liable for insurance on the cutting, it was immaterial whether the appellants bore the risk, or employed others to bear it. The court said (Record, p. 31):

If the insurance mentioned by the agreement is an insurance on the increased value of the stone because of cutting, and thereby becomes one of the ingredients or elements of the compensation to be paid the claimants, then it may be the petitioners have the right to recover, upon the theory of the petition, and it is wholly immaterial whether they actually insured or not. In that view they had the right to take the risk themselves, and the insurance being a part of their compensation, their right to recover such part is not defeated by the fact that they did not pay insurance to third parties.

The attorney-general conceded that the United States "were bound to reimburse claimants their outlay for "insurance within certain bounds, with 15 per centum "added;" but he denied that they were under any obligation to make compensation for insurance risks borne by

the appellants themselves. He based this denial on two grounds, (1) that, in the contract, provision was only made for the payment of the "cost" of insurance, which provision he thought implied that compensation for insurance was to be made, not when the appellants carried the risk themselves, but only when they paid others for taking it; and (2) that the contract did not *expressly* make the appellants "insurers." Both of these grounds of objection are erroneous.

1. The provision for the payment of the "cost" of insurance did not imply that compensation for insurance was to be made, not when the appellants bore the risk themselves, but only when they paid others for bearing it. The clauses of the contract, which relate to this subject, are in the following words (Record, p. 30):

> And the parties of the second part hereby agree to furnish all the labor tools, and materials necessary to cut, dress, and box, at the quarry, all the granite aforesaid, in such manner as may be directed by the party of the first part.
>
> And the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay, or cause to be paid, to the said parties of the second part, or to their heirs, executors, administrators, or assigns, in lawful money of the United States, the *full cost* of the said labor, tools, and materials, and insurance on the same, increased by fifteen (15) per centum thereof.

The last clause is susceptible of three different *verbal* interpretations. It may be read as requiring the United States (1) to pay "the full cost of said labor, tools and materials, and insurance on the *cost* of said *labor, tools and materials;*" or (2) to pay "the full cost of said labor, tools and materials, and insurance on said *labor, tools and materials;*" or (3) to pay "the full cost of said labor, tools and materials, and the *full cost* of insurance on said *labor, tools and materials.*" It is wholly immaterial which of these three readings shall be adopted. In meaning they are all substantially the same. The attorney-general reads the contract as if it required the United States to pay

"the full cost of said labor, tools and materials, and *the full cost of* insurance on said labor, tools and materials." Let it be assumed, for the purposes of the argument, that this is the correct reading of the clause, so that the verbal provision of the contract is, in truth, for the payment of the "*cost*" of the insurance. The contract, so read, would not imply that compensation for insurance was not to be made when the appellants took the risk, but was only to be made when they paid others for taking it. The cost of a thing is not necessarily the price paid for it in money to other persons. Labor, care, anxiety, hazard, risk—each and all of these may represent and measure the cost. If this insurance, which other clauses of the contract required the appellants to furnish to the United States, and which the appellants did furnish as required, involved risk, hazard, anxiety, labor or care on the part of the appellants, such risk, hazard, anxiety, labor, or care was just as clearly embraced in the *cost* of the insurance to the appellants, for which they would have been entitled to compensation, under this supposed phraseology of the contract, as money paid to an insurance company would have been. It may be true, in a very narrow sense, that a policy whereon no loss occurs "*costs*" the insurance company nothing beyond the paper, ink, and clerical labor expended, but the "*cost*" of insurance to the insurance company, in its ordinary and just commercial sense, is determined in a very different way. It is determined by the figures which express in dollars and cents that which experience shows to be the real measure of the risk assumed. The insured pays not for the loss, but for the risk. It is the insurer alone who pays the loss. Upon this theory of the attorney-general all insurance contracts on which no losses occur fail for want of consideration, and premiums thereon, if not prepaid, are not collectible, and if prepaid may be recovered back.

If the cost of insurance was payable under this contract, not when the appellants themselves insured the property, but only when money was paid to others for insurance, then, on the same narrow interpretation of the contract, the cost of the labor of cutting would have been payable, not when the appellants themselves performed the labor, but only when they paid others for performing it. So, also, in that case would the cost of the skilled labor expended in the manufacture of the tools have been payable, not when the appellants themselves manufactured them, but only when they paid money to others for their manufacture; and the cost of the materials, including the hoop-iron and lumber used in boxing the stones, would have been payable, not so far as the appellants had manufactured them, but only when they had paid money to others for manufacturing them.

Upon the same principle of interpretation an agreement to pay clerks' costs, or sheriffs' costs, or the costs of the marshal, magistrate, or notary would exclude all charge for the personal services of the officers. So, too, a promise to pay to a carrier the cost of transportation, to a wagon-maker the cost of a wagon, to a physician the cost of medical or surgical attendance, to a tanner, blacksmith, shoemaker, or tailor the cost of his commodities, would exclude all charges for the personal labor of the promisee incorporated into such commodities.

The contract did not, expressly or by implication, require the appellants to employ others to insure the property. They were themselves able to make good all marine losses. They were responsible, solvent insurers. This is shown by the record. The contract itself made the appellants better insurers for the government in this case than any insurance company could possibly have been. It secured to them more than $2,000,000 of the money of the

United States, out of which to make good any losses incurred. The security afforded by their insurance could only have been impaired by a succession of losses which would have set at defiance all the tables of probabilities on which the system of marine insurance is based. Measured by the standards applied to insurance companies, the security furnished by the appellants was most ample in extent and reliable in character. If the question had been raised, the officers of the government would undoubtedly have preferred, as the interests of the government certainly would have required, that the insurance money should be *reserved* from the payments made by the United States to the contractors, rather than *collected* from insurance companies employed by the contractors to take the risk. There would have been more uncertainty, hazard, difficulty, and delay in the latter arrangement than in the former. If the appellants had seen fit to effect insurance on the property represented by the cutting with other insurers, such insurance would have been merely reinsurance for the indemnity of the appellants.

2. The second ground on which the attorney-general denied the obligation of the United States to pay for insurance, on risks borne by the appellants themselves, was that the contract did not *expressly* make the appellants "*insurers.*" If he only meant by this that the designation "insurers" was not *expressly* applied to the appellants, in the contract, the proposition was true; for the word "insurers" does not occur in the contract; nor does the word "insurance" occur therein, except in the paragraph just considered. But then the proposition, in that sense, would seem to be wholly immaterial. If, on the other hand, he meant that the contract did not clearly and unequivocally constitute the appellants insurers of the cutting he was altogether wrong.

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CARGO OF SCHOONER JOSEPH FARWELL.

The next item of the appellants' demand is for the repayment of the sum of $1,800, paid by them for saving the cutting on the cargo of the schooner *Joseph Farwell*. Under the contract of April 22, 1873, the appellants bore the risk of loss on the cutting, and were to be paid, by the United States, for bearing such risk; but under the contract of September 17, 1877, the United States bore this risk. The following is the provision of the latter contract (Record, p. 12, below middle of page):

> And it is further understood and agreed that the party of the first part assumes all risk of damage to cutting on said stone while being transported to the site of said building, provided such damage does not result from the carelessness or negligence of the said parties of the second part.

The stipulation to pay for insurance on the cutting, which the United States made in the contract of April 22, 1873, was purposely excluded from the contract of September 17, 1877. The appellants could have made no claim for saving the cutting from shipwreck, under the contract of April 22, 1873, for they were insurers of the cutting under that contract, and were entitled to compensation for bearing the risk thereon, but not to reimbursement for the expenses of saving it from shipwreck.

The court of claims found that the cargo of the *Joseph Farwell* "was cut and dressed under said second contract;" that is to say under the contract of September 17, 1877. But, as to the cutting on the cargo of the *Catawamteak*, for saving which the appellants demanded compensation in the court of claims, the finding of the court was that the appellants paid to wreckers, employed by her master, the sum of $1,000 for saving the cutting, and that the granite "was cut and dressed under said contracts," without any specification of the amount cut *under either* contract. The appellants therefore cannot recover for saving

the cutting in the case of the cargo of the *Catawamteak*, but must restrict their demand to the cargo of the *Joseph Farwell*.

The facts, which constitute the basis of this branch of the appellants' demand, under the contract of September 17, 1877, are the following: The appellants agreed to cut the granite on Hurricane Island, and to deliver it at the site of the custom-house in St. Louis. The United States agreed to bear the risk of damage to the cutting, *in transitu*. The cargo of the *Joseph Farwell* went to the bottom of the sea, and, if the appellants had not raised it, the United States would have incurred a total loss of the cutting, on all the stones on board. The appellants, at an expense of $1,800,rescued from loss, for the United States, the cutting on all the stones. The United States accepted and used the stones so saved, with the cutting thereon. And the United States have not repaid to the appellants any part of the sum of $1,800 paid for saving the cutting on the granite, which cutting was worth more than nine times as much as the stock. The appellants contend that these facts support an implied promise, on the part of the United States, to repay the said sum of $1,800.

It would seem that the court of claims lost sight of that clause of the contract wherein the United States assumed the risk of damage to the cutting. The court said (Rec., pp. 31, 32):

> The modified contract provides "that the parties of the second part covenant and agree, with the party of the first part, to furnish, from their quarry at Hurricane Island, state of Maine, and deliver, at the site of the aforesaid building, such pieces of granite as may be required for the exterior walls of the building aforesaid, as may be designated by the party of the first part, and to cut, dress and box the same." * * It being the duty of the petitioners to deliver the stone at St. Louis, they took upon themselves, by the terms of their agreement, all the labor and expense incident to the transportation; and if, in the transportation, any accident happened to the stone, increasing the cost of transportation, such cost must fall upon them as incident to the performance of the contract on their part.

The court did not even refer to that clause of the contract which binds the United States to bear the risk of damage to the cutting, but seem to have supposed that, under the contract of September 17, 1877, the appellants were to bear the risk of damage to the cutting, and to have forgotten that the United States had, in express terms, assumed that risk. The reasoning of the court seems to be that the only effect of the loss of a cargo of stone, by shipwreck, was to increase the *cost of transportation*, of the granite covered by the contract, and that, inasmuch as the appellants were to bear the cost of transportation they were also to bear the increase of cost resulting from the loss of stone by shipwreck. The court would seem to have wholly overlooked the relation sustained by the carrier to losses by the perils of the sea. Loss of cargo by shipwreck does not fall upon the carrier. It does not increase the cost of transportation. It constitutes no element of the cost of transportation. Nor does the cost of raising shipwrecked property from the bottom of the sea fall upon the carrier, or increase the cost of transportation, or constitute an element of the cost of transportation. In this case the relation of the appellants to the United States, so far as it regarded the cutting, was precisely the same as the relation of the carrier to the owner of the goods. For the United States had, in the contract of September 17, 1877, expressly assumed all risk of damage to the cutting *in transitu*.

If it be possible to extract from the opinion of the court any other reason for the judgment, it would seem to be this, that, inasmuch as the stock and the cutting were inseparable, it cost no more to rescue both than to rescue one, and that the appellants incurred no expense, in saving both the stock and the cutting, which they would not have necessarily incurred in saving the stock alone. But it is

hardly possible that the court based the judgment in this case on that ground. For the principle involved in such a decision would exclude those who have become salvors of derelict cut stones, under the maritime law, from compensation for the value of the cutting saved, on the ground that it cost them no more to save both stock and cutting than to save the stock alone; and so their salvage would be restricted to the stock alone, which would be, in value, but a very small part of the cargo.

Mr. Kenneth Rayner, solicitor of the treasury, to whom this demand was referred by the secretary, was of the opinion that it should not be paid, because, to use his own language—

> The expenses so paid were incident to the transportation of the stone; and if the contractors paid the same as necessary to enable them to complete their contract by a delivery of the stone, they did no more than it was proper and right for them to do, but in their own interests, and not in the interests of the government. The interests of the latter were secured by the bond annexed to the contract. The expenses were necessarily and properly to be borne by the contractors. They constituted part of the risk the parties assumed in undertaking to make the delivery, and it was a reasonable assumption that in a business point of view the expenses were calculated for in the terms of their contract.—*Letter of March* 26, 1878. (Record, p. 20.)

This view of the case was not presented by the assistant attorney-general, in the court of claims; but it may be presented in the supreme court. If, in the contract of September 17, 1877, the United States had assumed no risk of loss on the stones by shipwreck, then it would have been true that the expense of saving the cutting, as well as the stock, was incident to the work undertaken by the appellants; and that this expense was incurred wholly in their own interest, and not at all in the interest of the United States; and that the expense of saving the value of the cutting, as well as the value of the stock, was included in the risk assumed by the appellants when they undertookto deliver the granite. And in that case the

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United States would have promised to pay for this insurance on the cutting. But if the United States did assume all risk of loss on the cutting of the stone cut under the contract of September 17, 1877, then all these propositions are manifestly erroneous. Obviously the main question turns upon the effect to be given to the following clause in that contract (Record, p. 12):

> And it is further understood and agreed that the party of the first part assumes all risk of damage to cutting on said stone while being transported to the site of said building, provided such damage does not result from the carelessness or negligence of the said parties of the second part.

The question is whether, in view of all the provisions of the contract, this stipulation is to be construed as covering total losses by shipwreck, or is to be restricted to mere fracture or discoloration of the stones. The appellants insist that the damage to the cutting, of which the government takes the risk, is not limited, either in character or degree; that it covers a total as well as a partial destruction of the value represented in the cutting—the loss of the whole of that value, as well as the loss of one-fourth or one-half of it, and that it embraces damage resulting, not merely from fracture or discoloration but also from sinking in the sea.

Mr. Rayner, on the other hand, was of the opinion that the United States took no risk of any damage except such as resulted from fracture or discoloration of the stones; that when the entire value of both stock and cutting was lost by shipwreck the appellants were to bear, not only the loss of the rough stock, but also the loss of the cutting. His theory was that the appellants were bound by this contract to deliver at St. Louis each identical stone which was cut, dressed, and boxed for shipment on Hurricane Island; that in case of total loss of stones by shipwreck it was necessary for them, under the modified contract as under the original contract, to deliver substituted stones,

cut and dressed at their own expense; that any damage occasioned by fracture or discoloration, *in transitu*, not resulting from carelessness or negligence on the part of the contractors, was to be borne by the United States, *only in case the damaged stones were delivered at St. Louis;* that in case of a total loss by shipwreck the United States were to bear no part of it, but could refuse to pay, not only for the rough stock, but also for the cutting, and if the stipulated advance of eighty per centum on the cutting had already been paid could recover it back.

That is to say, under the modified contract, as interpreted by Mr. Rayner, if twenty blocks of granite had been broken in pieces by a colliding steamer in a fog, after an hour's sail from Hurricane Island, without carelessness or negligence on the part of the appellants or their navigators, they could have secured the price of the cutting by transporting the worthless fragments to St. Louis; but if the stones had been sunk by collision in the Mississippi within a half mile of St. Louis without negligence or carelessness on the part of the appellants or their agents, the appellants could recover nothing for the cutting, but would even be compelled to refund the price already advanced therefor.

The appellants submit that these positions are erroneous. If the blocks of granite had been broken at the commencement of the voyage, so as to be worthless, the contract would have permitted the appellants to throw them overboard at once. The loss of the stock, in that case, would have fallen on them, and the loss of the cutting on the United States. If they had been sunk in the Mississippi river, within a half mile of St. Louis, so as to be worth- the loss of the stock would have fallen on the appellants, and the loss of the cutting on the United States. There is certainly no provision in the contract of Septem-

ber 17, 1877, expressly requiring the transportation of the worthless fragments to St. Louis, in order to give effect to that clause which imposes the risk of loss *in transitu* upon the United States. Nor is there anything in the contract from which such a condition can be inferred. On the contrary a provision involving such useless expense to the appellants, without the slightest advantage to the United States, would have been a senseless provision. Mr. Rayner himself was inconsistent on this point. In his letter of May 15, 1880, referring to an opinion of his predecessor, he concedes—

> That in case a stone with the cutting and labor thereon is *destroyed or lost*, without the negligence or fault of the contractors, the loss of the cutting and labor already paid for falls upon the United States. (Record, p. 20.)

This was a virtual abandoment of his former position. If the loss of the cutting already paid for fell upon the United States, three consequences inevitably followed. (1) The United States were, on precisely the same ground of principle, held to bear the loss of the cutting not already paid for. The payments "already made" were made *on account*, and, if the payments not already made could not be recovered by the appellants, then the payments already made could be recovered back by the United States. (2) Inasmuch as the loss of the cutting already paid for fell upon the United States, the appellants, by paying this loss for the United States, became entitled, on an implied contract, to compensation therefor. (3) Inasmuch as the loss of the cutting not paid for fell upon the United States, the appellants, by the payment of this loss for the United States, became entitled to compensation therefor, under an implied contract.

The attorney-general asserts that the "claimants are only assignees, if there are any just claims" against the United States for saving the cutting on the cargo

in controversy. He probably means that the claim for saving this property, as against the United States, was originally held, not by the appellants, but by the wreckers, and that whatever claim the appellants hold in connection therewith they must have acquired by assignment from the wreckers; and, further, that such assignment must have been void.

The appellants submit that the attorney-general is mistaken. In the first place the appellants did not purchase a claim against the United States; but they paid out money for the benefit of the United States. They did not acquire, by assignment, a claim against the United States, which had originally belonged to the wreckers; but, by the payment of money for the benefit of the United States, they required an original claim of their own against the United States. Inasmuch as the stock and the cutting, though differing in equitable ownership, were physically inseparable, the relations of the parties were such as to make it proper for either to advance, to the wreckers, the cost of saving the property of the other. But then in the second place, until property saved from shipwreck is accepted by an owner, who does not contract for saving it, a claim for salvage, in the sense of the maritime law, is not a claim *in personam*, but only a claim *in rem*. The property in question was not used, or received, by the United States, until long after the appellants had paid the wreckers for saving it. No claim *in personam* against the United States, for saving the property represented by the cutting, ever existed. At the time when the claim of the wreckers for saving this property was extinguished by payment, their claim was only a claim *in rem*, and had never been anything else. The only claim *in personam* growing out of this transaction ever held against the United States was, therefore, not an assigned claim of the wreckers for saving

the cutting on this granite, but an original claim of the appellants for paying the wreckers for saving it. The wreckers never held any claim *in personam* against the United States capable of assignment or sale.

But finally there is no such thing known to the maritime law as a salvage claim *in personam* against the United States. The United States cannot be sued, in admiralty, in an action *in personam*, on a salvage claim. Such claim could not have been lawfully assigned; nor could it have lawfully existed.

HALBERT E. PAINE,
Atty. for Appellants.

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In the Supreme Court of the United States.

OCTOBER TERM, 1888.

DAVIS TILLSON AND WILLIAM C. KINGSLEY, co-partners, trading under the style of the Hurricane Island Granite Company, appellants,
vs.
THE UNITED STATES.
No. 227.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR APPELLEES.

In the Supreme Court of the United States.

OCTOBER TERM, 1888.

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vs.
THE UNITED STATES, appellees.

No. 227.

APPEAL FROM THE COURT OF CLAIMS.

STATEMENT OF THE CASE.

This is an appeal from a judgment of the Court of Claims, dismissing claimants' petition passed in a cause in said court pending on the 6th day of April, 1885, wherein the claimants, appellants, sought to recover from the United States certain moneys alleged to be due as balance on account of contracts made between the said parties. These contracts were of date in the years 1873 and 1877, respectively, and were for material to be used in the building of

a custom-house in the course of construction at Saint Louis, Mo. There are four items of claim set out in the petition filed in the cause, and to be considered in this appeal.

(1) Insurance on the value of the cutting of the stock furnished under the first contract.

(2) Expenses paid by the claimant in rescuing vessels wrecked in the transportation of stone under the second contract from Hurricane Island to the city of Baltimore.

(3) The cost of transportation of boxing used in shipment of stone from Hurricane Island to Saint Louis.

(4) Expenses incurred in the unloading, handling, and reloading granite shipped at Hurricane Island to the site of the building.

BRIEF OF ARGUMENT.

It will be contended that the Government is not liable for insurance, because the language of the contract does not imply such an obligation, and because there was no insurance effected upon the stock by the claimants. The clauses of the contract which relate to the undertakings of the contractors and the promise of the Government in this behalf are as follows:

> The parties of the second part covenant and agree to and with the party of the first part to furnish from their quarry at Hurricane Island, State of Maine, and deliver at the site of the aforesaid building as much gray granite as may be required by the plans to be adopted by the Treasury Department for said building. And the parties of the second part hereby agree to furnish all the labor, tools, and materials

> necessary to cut, dress, and box at the quarry all the granite aforesaid, in such manner as may be directed by the party of the first part. And the party of the first part, acting for and in behalf of the United States, doth covenant, promise, and agree to pay or cause to be paid to the said parties of the second part, or to their heirs, executors, administrators or assigns, in lawful money of the United States, the full cost of the said labor, tools, and materials, and insurance on the same, increased by fifteen (15) per cent. thereof.
>
> And the said parties of the second part further agree to cut, as well as furnish and deliver, all granite herein contracted for, at such times as may be required by the said party of the first part.

It will be observed that the appellants did not pay any insurance at all, nor did they effect an insurance, but nevertheless seek to recover what would be the value of a marine risk upon the marble in its new form, after having been cut and dressed. This was what the appellants had undertaken to do, viz, to cut as well as deliver and furnish all the granite as had been contracted for. By the terms of the agreement the appellants were not treated with as insurers; they could insure or not as they saw best. Nor was it to the interest at all of the Government that they should insure. The Government was amply protected, in case of failure to comply with the terms of the contract, in the bond that had been taken for the performance of the contract. But from the very terms of the contract itself no construction can be derived that will warrant the liability of the Government for the payment of what might have been the cost of something that was never done. The contract is that the parties of the sec-

ond part agree to furnish all the labor, tools, and materials necessary to cut, dress, and box at the quarry the granite, and the parties of the first part agree to pay the full cost of said labor, tools, and materials, and insurance on the same, increased by 15 per cent. thereof.

It is contended that the word "materials" means and applies to what materials are necessary to cut, dress, and box the granite at the quarry and not to the granite in its new form. The structure of the contract is capable of this construction, and no other, and can not be construed to mean the worth of the insurance on the cutting. Under the original and modified contracts it was the duty of the appellants to deliver the stone as they had agreed, and it makes no difference whether the property in its improved condition was in the appellants' or appellees' at the time it was started from the quarry for transportation. It was, then, the delivery that the appellants had assumed and undertaken, without respect to the fact of a changed condition in the material and the relationship of the parties to the same.

The modified contract provides as follows:

> That the parties of the second part covenant and agree with the party of the first part to furnish from their quarry at Hurricane Island, State of Maine, and deliver at the site of the aforesaid building such pieces of granite as may be required for the exterior walls of the building aforesaid as may be designated by the party of the first part, and to cut, dress, and box the same.

It is provided by the original contract that the party of the second part should furnish and deliver, etc., as

much granite as was required, etc. It then became the duty of the appellants to deliver the stone at the site of the building, and they undertook all the labor and expense incident to the transportation. If, then, during the time of such transportation, anything occurred to increase the expense and cost of the same, it is a little difficult to see how the Government shall become liable for such increased cost. Thus it will be contended that the appellees must be absolved from any charge that the appellants incurred in saving the cargoes of the vessels engaged in carrying the stone from Hurricane Island to Baltimore. There is one other item of charge made by the appellants, viz, the cost of transportation of the boxing from the quarry. The findings show no charge was made for the boxing, and as nothing was paid by the appellants, it can not be conceived upon what principle a demand is made for payment on this account.

Respectfully submitted.

R. A. HOWARD,
Assistant Attorney-General.
W. I. HILL,
Assistant Attorney.

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